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Supreme Court of the United States

OCTOBER TERM, 1969

No. 977

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child, MAURICE JAMES, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT filed December 22, 1969
PROBABLE JURISDICTION NOTED February 24, 1970

Docket Entries.

June	6-69	Filed complaint for a 3-judge court, etc.
June	6-69	Filed Order to Show Cause re: Prel. Inj. Ret.
June	6-69	Filed Plaintiffs Memorandum of Law in support of temp. restraining order, etc.

Docket Entries.

June 9-69 Filed summons and return. Served defendants on 6/6/69.

June 6-69 Filed order appointing David Gilman to serve summons and complaint. Clerk.

June 12-69 Filed Memorandum of Law in behalf of deft. Wyman in opposition to motions. (filed in court).

June 12-69 Filed (in court) Affidavit of Brenda Soloff in opposition.

June 13-69 Filed Temporary Restraining Order. Defendants, their successors, etc. are restrained as indicated, pending determination by a 3-judge court, etc. Tenney, J.

June 13-69 Filed Plaintiffs Memorandum of Law in support of temp. restraining order.

June 13-69 Filed Opinion #35941. Tenney, J. Without intimating any opinion on the merits of the within action, it seems abundantly clear that the recent decisions necessitate the convening of a 3-judge district court to consider the substantial constitutional questions relating both to the 4th Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein. In order to effectuate the terms of this opinion a temporary restraining order has been entered effective at 4:00 P.M. on 6/13/69. So ordered. (mailed notice).

June 23-69 Filed Pltffs supplemental affidavits in support of Pltffs motion for preliminary and permanent injunction.

Docket Entries.

June 25-69	Filed record of proceedings dated 6/13/69.
June 26-69	Filed ANSWER of Deft Goldberg.
June 26-69	Filed affidavit of J. Lee Rankin.
June 27-69	Filed Memorandum of law on behalf of Deft Wyman.
June 27-69	Filed ANSWER of Deft Wyman.
June 27-69	Filed Defts affidavit in opposition to Pltffs application for a permanent injunction restraining and enjoining the city and state.
June 27-69	Filed Deft Wymans notice of motion for an order vacating the temporary restraining order.
July 2-69	Filed Memorandum of Pltff in response to Judge Tenneys request for information.
June 30-69	Before Feinberg, CJ. McLean J. Tenney J.—Oral argument held and concluded (See Transcript) Dec. Res.
July 14-69	Filed Affidavit of Nancy Duff Levy of service of pltfs'. letter to Judge Feinberg, on 7/2/69, etc.
Aug. 18-69	Filed OPINION #36102. Three Judge Court—Feinberg, U.S.C.J., Tenney, D.J. and McLean, D.J. Plaintiffs' motion for a permanent injunction is granted. SUBMIT ORDER, on notice, in conformity herewith. (Feinberg and Tenney). I would deny the motion and dismiss the action. (McLean, J.) (mailed).
Aug. 28-69	Filed Record of Proceedings before 3-judge court, of June 30, 1969.

Docket Entries.

Oct. 1-69	Filed Order for permanent injunction. Ordered that defendants, their successors, etc. are enjoined by reason of their refusal to freely consent to the entry of welfare officials into their dwelling places without a valid Search Warrant. McLean, J. signed by Feinberg, C.J., Tenney, D.J. One judge McLean, Dissenting.
Oct. 24-69	Filed Notice of Appeal by deft. George K. Wyman to the Supreme Court.

Complaint.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Plaintiffs,

VS.

JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York; GEORGE K. WYMAN, individually and as Commissioner of the State of New York Department of Social Services,

Defendants.

I.

1. This is an action for injunctive and declaratory relief under Rule 57 of the Federal Rules of Civil Procedure authorized by Title 42 U.S.C. § 1983 to secure rights, privileges, and immunities established by the Fourteenth Amendment to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, Title 42 U.S.C. § 601 *et seq.* and 1381 *et seq.*, and regulations promulgated thereunder. By this action plaintiffs seek to prevent the termination of public assistance grants upon the grounds that such termination constitutes a violation of (1) Plaintiffs' right to be secure in their home from unreasonable searches of and (2) Plaintiffs' right to privacy.

II *Jurisdiction*

2. Jurisdiction is conferred in this Court by Title 28 U.S.C. § 1343(3) and (4) providing for original jurisdiction of this Court in suits authorized by Title 42 U.S.C. § 1983; and by Title 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments and Title 28 U.S.C. § 1331 relating to claims arising under federal law.

3. Plaintiffs respectfully request that a three-judge district court be convened. Such a court is required under 28 U.S.C. § 2281 because Plaintiffs seek to enjoin the enforcement of regulations of the New York State Department of Social Services of statewide application, Sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations (hereinafter NYCRR), promulgated pursuant to the authority conferred by State statute, Section 134 of the Social Services Law, upon the ground that such regulations contravene the United States Constitution.

III *Plaintiffs*

4. Plaintiff Barbara James, individually and on behalf of her minor child, Maurice James, is an adult citizen of the United States, residing in New York State, and is and was at all times herein relevant the mother of a needy child. Plaintiffs have no income, resources, or source of support other than Public Assistance benefits which until June 2, 1969 they have received from the New York City Department of Social Services under the New York State program of Aid to Families with Dependent Children (AFDC). This program is administered and supervised by Defendants under color of laws, statutes, ordinances,

regulations, customs and usages of or pertaining to the State of New York.

5. Plaintiffs bring this action on behalf of themselves and all others similarly situated, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiffs are members of a class composed of needy parents and their dependent children residing in the State of New York and eligible to receive aid under the New York program of Aid to Families with Dependent Children, but for the imposition of the requirement challenged herein that applicants and recipients of public assistance permit caseworkers and other officials of the Department of Social Services to enter their homes without a valid search warrant and without the freely-given consent of said recipients. Members of this class have either been denied assistance by imposition of the "home visit" requirement as a condition of receipt of said assistance, despite the fact that this requirement denies applicants and recipients their right to be free from unreasonable search and seizure and their right of privacy; or have permitted entry to their homes under compulsion of threatened termination of benefits. The class is so numerous as to make joinder of all its members impracticable. There are questions of law and fact common to the class. The claims of the named Plaintiff are typical of the claims of the class. The named Plaintiff will fairly and adequately protect the interests of the class.

6. New York, like all other states, cooperates with the federal government in extending public assistance to needy persons, as authorized in the Social Security Act of 1935. Pursuant to that legislation, New York receives grants-in-aid from the federal government covering half of its cost in providing aid to the aged (OAA), the blind (AB),

the permanently and totally disabled (APTD), and families with dependent children (AFDC), under a New York "state plan", consisting of state statutes and regulations approved by the United States Department of Health, Education and Welfare.

IV *Defendants*

7. Defendant JACK R. GOLDBERG is the Commissioner of the Department of Social Services of the City of New York. He is responsible under the Social Services Law of the State of New York for the administration of state programs of public assistance within the City of New York.

8. Defendant GEORGE K. WYMAN is the Commissioner of the Department of Social Services of the State of New York. He is chief executive and administrative officer of that Department and has general responsibility for the conduct of all state and local Welfare officials, pursuant to the Social Services Law.

V. *Statement of Claim*

9. On May 8, 1969, Adreanne Finnell, a caseworker in the New York City Department of Social Services, wrote to Plaintiff requesting an appointment to visit her on May 14, 1969. Plaintiff immediately contacted Adreanne Finnell and informed her that she would be willing to supply any information that was reasonable and relevant to her need for public assistance. Plaintiff insisted that any discussions or contacts take place not in her home, but in the office of the Social Services Department. The caseworker explained that Department regulations (§ 175 of the Poli-

cies Governing the Administration of Public Assistance) required that she visit the client in her home, and that refusal by the client to permit a home visit would result in termination of her welfare benefits. Plaintiff continued to refuse the caseworker entry into her home on the grounds that her right to privacy and her constitutional protection against illegal search would be thereby forfeited.

10. On previous visits to the homes of Plaintiffs and, on information and belief, of all other persons similarly situated, questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility.

11. On May 13, 1969, the New York City Department of Social Services sent Plaintiff a notice of intent to discontinue assistance based on Plaintiff's refusal to permit a home visit by her caseworker. (See Annexed hereto as Exhibit "A".) A "prior review" hearing (a hearing prior to termination of benefits) was scheduled and completed on May 27, 1969. At the time of this hearing Plaintiff and her attorney reiterated Plaintiff's desire to cooperate with her caseworker's request for information about Plaintiff's present needs, so long as such discussions were not conducted in Plaintiff's home. However, the Department of Social Services' decision after hearing upheld the caseworker and directed termination of benefits on June 2, 1969, based on Plaintiff's refusal to allow the caseworker entrance into her home. (Decision annexed hereto as Exhibit "B".)

12. The policies and practices of the Defendants pertaining to home visits deprive Plaintiffs and all other persons similarly situated of rights, privileges and immunities secured by the Constitution of the United States, as amended.

More particularly, Defendants, pursuant to New York State regulations, 18 N.Y.C.R.R. §§ 351.10 and 351.21 (as implemented locally by § 175 of the New York City Policies Governing the Administration of Public Assistance), have:

(a) Terminated public assistance benefits because Plaintiffs and other persons similarly situated have refused to allow caseworkers to enter their homes and interrogate plaintiffs about matters that are personal and private, in violation of plaintiffs right to be free from unreasonable searches under the Fourth and Fourteenth Amendments to the Constitution of the United States, and further in violation of their right to privacy under the First, Fourth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States, and

(b) Entered the home of plaintiffs and all other persons similarly situated, and conducted interrogations about matters that are personal and private, through consent given under threat of termination of welfare aid necessary for the survival of the family and to which the family is entitled, thereby conditioning the continued receipt of such aid upon the surrender of plaintiffs' rights to be free from unreasonable searches and to privacy, as set forth above.

13. Defendants' termination of Plaintiffs' public assistance grant threatens to cause them extreme hardship, suffering and anxiety, including inadequate food, clothing and shelter. Plaintiffs have suffered and will continue to suffer severe and irreparable injury to their health, well-being and family life as a result of this action until such time as this action is declared unlawful.

14. Plaintiff need not continue to exhaust her administrative remedies in this matter under 42 U.S.C. 1983.

Plaintiffs have no adequate remedy at law and defendants will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

VI. *Prayer for Relief*

WHEREFORE, Plaintiffs respectfully pray on behalf of themselves and those similarly situated that this Court:

1) Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. 2281 and 2284 to determine the controversy;

2) Issue a temporary restraining order and preliminary injunction pursuant to 28 U.S.C. 2284, ordering the Defendants to reinstate the Plaintiffs to the assistance to which Plaintiffs and the class they represent are entitled and ordering Defendants to cease the conduct herein described pending the determination of the cause;

3) Enter a declaratory judgment pursuant to 28 U.S.C. 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure:

(a) Declaring that the policies and practices complained of herein deprive the Plaintiff and others similarly situated of rights, privileges, and immunities secured by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, 42 U.S.C. § 601 *et seq.* and § 1381 *et seq.*

(b) Declaring that employees or officials of the New York City Department of Social Services may not:

(1) discontinue, or reduce financial assistance, or otherwise interfere with the receipt of such assistance, because of a recipient's refusal to consent to entry into his or her home without a valid search warrant;

(2) threaten, explicitly, or implicitly, to take such action because of such a refusal; or

(3) enter the home of a recipient of public assistance except under a valid search warrant or on the basis of the consent of the recipient freely-given after the employee or official has clearly stated to the recipient that none of the afore-mentioned actions can be taken because of a refusal to consent.

(c) Declaring that no employee, agent, or official of the New York City Department of Social Services may enter and search any rooms within the home of a recipient of public assistance or touch and examine any objects therein except under a valid search warrant or on the basis of a consent freely given after a clear statement of the recipient's right to withhold consent without suffering loss or diminution of benefits.

4. Enter a permanent injunction restraining the Defendants, their successors in office, agents, and employees from:

(a) Entering into the dwelling places of Plaintiff and others similarly situated, without obtaining a valid Search Warrant issued upon probable cause or on the basis of consent of the recipient freely given after the employee or welfare official has clearly stated to the recipient that failure to give such consent will not result in discontinuance or reduction of financial assistance, or criminal prosecution.

(b) Interrogating or questioning an applicant for or recipient of public assistance regarding activities not demonstrably relevant to issues of eligibility.

5. Allow Plaintiff her costs herein, and grant her and all others similarly situated such additional or alternative relief as the Court may deem equitable, just and appropriate.

DAVID GILMAN

DAVID GILMAN
JONATHAN WEISS
MFY Legal Services, Inc.
759 Tenth Avenue
New York, New York

LEE A. ALBERT
NANCY DUFF LEVY
HENRY A. FREEDMAN
Center on Social Welfare Policy
and Law
401 West 117 Street
New York, New York 10027

(Verified by Barbara James on June 6, 1969.)

Exhibit A, Annexed to Complaint.

[SEAL]
THE CITY OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES
Center: Kingsbridge
Address: 248 East 161 Street
Bronx, New York 10451

NOTICE OF INTENT TO SUSPEND OR DISCONTINUE PUBLIC ASSISTANCE

(*Prepare in Triplicate*)

Mrs. Barbara James
90 West 164 Street #2B
Bronx, New York 10452

ADC 2604949
Case Number

This is to advise you that this Department intends to ☐ SUSPEND ☒ DISCONTINUE your public assistance grant on May 20, 1969, for the following reasons:

Failure to comply with Department of Social Service policy (Refusal to allow a home visit for Recertification purposes).

If you feel that your public assistance grant should not be suspended or discontinued you may request a review of your record by a Review Officer by replying on or before May 20, 1969. In such case, a notice of appointment will be sent to you requesting your appearance at a designated time and place, in order to review your case with you and afford you an opportunity to present written and/or oral evidence and to state reasons demonstrating why your grant should not be suspended or discontinued. At this

review, you have the right to appear with an attorney or any representative of your own choosing.

Unit Supervisor: G. Hayward

Date: May 13, 1969

Caseload No.: 07-4

If you wish a review, please mark an X in Box No. 1, below. If you do not wish a review, please mark an X in Box No. 2, below. If you fail to reply, we will assume that you agree with the action the Department proposes to take.

Box No. 1: ☐ I REQUEST A REVIEW

Box No. 2: ☐ I DO NOT REQUEST A REVIEW

Please return a copy of this letter in the enclosed self-addressed envelope and keep the other copy of this letter for your records.

If, after this review, you are still dissatisfied with the decision given you, you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services at 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550.

Enclosed: self-addressed return envelope.

Signature ..... Date .....

Exhibit B, Annexed to Complaint.

MEMORANDUM

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

Date: June 2, 1969

To: Miss Catherine Hillery, Director
Kingsbridge Social Service Center

FROM: Frank Leonard, Administrator
Review Section

SUBJECT: REVIEW OF PROPOSED CASE CLOSING

On 5/27/69 a Review was held at 271 Church Street before Frank Leonard, Administrator of the Review Section. Present at the Review were the followng: Mrs. Barbara James, the client, and her son, Maurice; Mr. David Gilman, the client's attorney; Mrs. Shirley Watson, a representative of the National Welfare Rights Organization; Mr. Arthur Schiff; and the Supervisor and caseworker from the Kingsbridge Center.

The Center proposed to discontinue assistance for the following reason, stated on the form M3C:

> "Failure to comply with Department of Social Service policy (Refusal to allow a home visit for Recertification purposes)."

The following section from the Manual of *Policies Governing the Administration of Public Assistance* was read at the Review:

> Mandatory visits must be made in accordance with law which requires that persons be visited at least once

every three months if they are receiving Home Relief, Veteran Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled, or Assistance to the Blind. (Section 175, page 78)

Mrs. James receives Aid to Dependent Children.

According to this section of the Manual, four visits per year would be required to a family in receipt of Aid to Dependent Children. In actual practice, the New York City Department of Social Services, with the permission of the State Department of Social Services, in some cases has permitted the sending of form letters in place of two of these yearly visits, with the remaining two yearly visits, one every six months, being retained.

Although section 175 of the Manual does not specifically say that the "mandatory visits" referred to must be made in the home, it is the Department of Social Services' policy that the visits every six months must be made in the home.

Mr. Gilman stated that his client was willing to cooperate with the Center in every way and was willing to provide any information that might be requested. He stated that his client was willing to permit "visits" by workers from the Center at any location designated, with the exception of the client's home. Mr. Gilman contended that to permit visits in the client's home would jeopardize the client's right to the privacy of her home.

Mr. Gilman requested to know what specific section of City or State rules, regulations or laws provided for such mandatory home visits. However, it is not incumbent upon the Review Section to cite the City or State rules, regulations or laws upon which Department of Social Services policy is based. The Review Section merely determines whether the closing of a particular case is in accordance

with the policy of the Department of Social Services. It is assumed that the Department's policy is derived from City or State rules, regulations or laws.

The home visit which Mrs. James refuses to permit is for the purpose of determining if there are any changes in her situation that might affect her eligibility to continue to receive Public Assistance, or that might affect the amount of such assistance, and to see if there are any social services which the Department of Social Services can provide to the family.

Such a visit is required by Department policy. The closing of this case because of the client's refusal to permit such a visit is in accordance with the policies of the Department of Social Services.

DECISION: The action of the Center is affirmed.

Affidavit of Barbara James, Sworn to June 6, 1969.

(Printed at pp. 24-25.)

Order to Show Cause.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Let defendants show cause, in Room 506 of the United States Courthouse, Foley Square, New York, New York, on the 10th day of June, 1969 at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order should not issue or the court take such other action as shall grant the Plaintiffs herein the following relief:

A preliminary and permanent injunction restraining and enjoining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from:

(1) Entering into the dwelling places of Plaintiff and others similarly situated, without obtaining a valid search warrant issued upon probable cause or on the basis of consent of the recipient freely given after the employee or welfare official has clearly stated to the recipient that failure to give such consent will not result in discontinuance or reduction of financial assistance or criminal prosecution.

(2) The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provisions of Title 28 United States Code Section 2281 and 2284.

(3) An order determining that this action may properly proceed as a class action pursuant to Rules 23 (a) and 23 (b) (2) of the Federal Rules of Civil Procedure.

Let the defendants further show cause why a temporary restraining order pursuant to Title 28 United States Code Section 2284 should not issue restraining the defendants, their agents, employees and attorneys and all persons in active concert and participation with them from

(1) discontinuing or reducing the named Plaintiff's public assistance grant because of her refusal to consent to a welfare official's entry into her home without a valid search warrant pending the hearing and determination of Plaintiff's motion for a preliminary injunction by a three-judge court convened pursuant to Title 28 United States Code 2281 and 2284.

The named Plaintiffs seek this temporary restraining order, and all those similarly situated seek a preliminary injunction and other relief on the grounds that:

1) They are each suffering, or threatened with imminent suffering of, irreparable injury in that they are without means to provide for themselves the basic necessities of food, clothing and shelter and will continue to suffer even greater deprivation until they are restored to full public assistance,

2) The issuance of a temporary restraining order for the named Plaintiffs and a preliminary injunction for the Plaintiffs and all those similarly situated will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiffs,

3) The statutes and regulations which require that a caseworker visit a recipient in her home as a continuing

eligibility condition violates plaintiffs right to be free from unreasonable search under the Fourth Amendment to the Constitution of the United States and her right to privacy.

4) Plaintiffs have no adequate remedy at law, as set forth more fully in the verified complaint and the affidavit of Barbara James and David Gilman attached hereto.

It Is Ordered, that service of this Order on defendants on or before 2 P.M. on the 9th day of June, 1969, be deemed sufficient.

Done and ordered at the United States Courthouse Foley Square, New York, New York, this 6th day of June 1969.

Charles Tenney,
United States District Judge.

Affidavit of David Gilman, in Support of Order to Show Cause.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID GILMAN, being duly sworn, deposes and says:

1. I reside at 160 West 96th Street, New York, New York 10025.

2. I am an attorney practicing with Mobilization For Youth Legal Services Unit, located at 759 Tenth Avenue, New York, New York.

3. In this capacity I have represented Mrs. Barbara James as her attorney from May 16, 1969, to the present.

4. The major part of my legal representation of Mrs. James has consisted of assisting her in problems she has had with the New York City Department of Social Services.

5. On May 8, 1969, Mrs. James received a letter from her caseworker, Adreanne Fennell, requesting an appointment to visit her on May 14, 1969. Mrs. James contacted Adreanne Fennell and informed her that she would be willing to supply any information that was reasonable and relevant to her need for public assistance. Mrs. James stated these discussions could take place in the welfare center, and under no circumstances could the caseworker

visit her in her home. The caseworker explained that Department regulations required that she visit the client in her home to discuss certification, and that refusal by the client to permit a home visit would result in termination of her welfare benefits. Mrs. James continued to deny the caseworker entry into her home.

6. On May 13, 1969, the New York City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance based on her refusal to permit a home visit by her caseworker.

7. On May 27, 1969, a prior review hearing was held at the Department of Social Services. At this hearing Mrs. James reiterated her desire to cooperate with her caseworker's request for information about her present needs, as long as such discussions were not conducted in Mrs. James' home. The review officer upheld the caseworker's decision to terminate benefits effective June 2, 1969, based on Mrs. James' refusal to allow the caseworker entry into her home, on the grounds that the law requires such a home visit.

8. Mrs. James has at no time refused to cooperate or made herself unavailable to Defendants for interviews or discussions concerning her eligibility for public assistance.

9. Mrs. James' sole contention is that any discussions, interviews or contacts with Departmental personnel may not be conducted in her home.

10. Under relevant constitutional provisions Mrs. James is not required to permit her caseworker entry into her home except upon presentation of a valid search warrant, nor can the Department terminate Mrs. James' assistance benefits because of such refusal.

11. That Mrs James and her family now face serious economic hardship due to the termination of her benefits and will suffer irreparable injury if these benefits are not restored.

12. No prior application for relief sought herein.

(Sworn to by David Gilman, on June 6, 1969.)

Affidavit of Barbara James, in Support of Order to Show Cause.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

BARBARA JAMES, being duly sworn, deposes and says:

1. I am the mother of Maurice James and reside with him at 90 West 164th Street, Apartment 2B in the City and State of New York.

2. I have been on Welfare for the past two years.

3. On May 8, 1969, my caseworker Adreanne Fennell wrote and told me that she planned to visit me at home on May 14, 1969. I called her the next day and asked her why she had to visit me in my home. She told me that she was required to make a home visit in order to recertify my case. I told her that I would supply her with any infor-

mation that she needed, but that I did not want her in my house. I told her I would come down to the Welfare center if she wanted. The caseworker Adreanne Fennell explained that she must visit me at home, and if I refused to allow her in she would be forced to terminate my case.

4. On May 13, 1969, I received a letter from the Welfare Department telling me that they intended to cut me off Welfare. They told me I could request a review before termination.

5. I requested a prior review and it was held on May 27, 1969. I told the review officer that I would cooperate and give any information that the Welfare people needed to know, but I did not want them in my house. The caseworker told the review officer that she was required by law to conduct the recertification interview in my home.

6. On June 2, 1969, the review officer decided that the local center was correct in terminating my assistance because I refused to allow the caseworker into my home. I have now been cut off Welfare, and I don't know how I will be able to pay my rent and take care of my child.

(Sworn to by Barbara James on June 6, 1969.)

Affidavit of Brenda Soloff, in Opposition to Order to Show Cause.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BRENDA SOLOFF, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for Defendant Wyman herein. I make this affidavit in opposition to plaintiffs' application for temporary restraining order and for the convening of a three-judge court.

As is more fully set forth in the accompanying memorandum of law plaintiffs show neither irreparable damage entitling them to a temporary restraining order nor a question of substance requiring the convening of a three-judge court. There is no indication in the complaint or affidavits that if plaintiffs comply with the home visit rule that they will suffer irreparable damage. This is made even more apparent by the fact that the attorneys who appeared in this case commenced a similar action in this Court in 1967 and have not pursued it. *Synester Bradley* v. *Ginsberg*, 67 Civ. 3047. That case too purports to be a class action.

Finally, as the accompanying memorandum of law indicates, the question is so insubstantial that neither injunctive relief nor a three-judge court is required.

WHEREFORE, plaintiffs' applications for temporary restraining order and for a three-judge court should be denied and the complaint dismissed.

(Sworn to by Brenda Soloff on June 13, 1969.)

Opinion Convening Three-Judge Court

TENNEY, J.

Plaintiff, individually and on behalf of her minor child and all other persons similarly situated, moves this Court for an order: a) convening a district court of three judges pursuant to 28 U.S.C. §§ 2281, 2284 for the purpose of hearing and determining her application for a permanent injunction restraining and enjoining the defendants from enforcing certain New York State Department of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States; b) granting a temporary restraining order pursuant to 28 U.S.C. § 2284(3) restraining the defendants from discontinuing, reducing or denying public assistance grants to all persons who object to the continued enforcement of the regulations challenged herein; and c) determining that this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2).

Plaintiff has been a recipient of Aid to Dependent Children benefits (hereinafter referred to as "ADC") for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit plaintiff in her home on May 14, 1969. In reply, plaintiff explained that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumstances could the caseworker make a home visit. The caseworker explained that Department of Social Services Regulations require that she visit plaintiff in her home to discuss recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her ADC benefits. While reiterating her willingness to provide whatever information was requested at the offices of the Department of Social Services, plain-

tiff continued to deny her caseworker entry into her home.

On May 13, 1969, the New York City Department of Social Services sent plaintiff a notice of intent to discontinue her ADC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the Department of Social Services. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

It is well settled that the convening of a three-judge district court pursuant to 28 U.S.C. § 2281 is not required where the claim involved is "obviously without merit", where the constitutional questions presented are "insubstantial" in that prior court decisions have clearly and unequivocally foreclosed the matter in dispute or where the suit seeks merely to enjoin local officers seeking to

enforce statutes of local as opposed to general or statewide application. 33 Brooklyn L. Rev. 157, 159-60 (1966). I find that the issues presented herein are neither insubstantial nor obviously without merit, and that the regulations sought to be enjoined are of statewide applicability. Without intimating any opinion on the merits of the within action, it seems abundantly clear that the recent decisions in *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* —— U. S. ——, 37 U.S.L.W. 4333 (1969); *King* v. *Smith*, 392 U. S. 309 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *McDonald* v. *United States*, 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967) necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein.

Pursuant to 28 U.S.C. § 2284(3), this Court "may at any time, grant a temporary restraining order to prevent irreparable damage." Based upon plaintiff's affidavit of June 6, 1969, such an order would seem appropriate at the outset of this action to prevent the termination of ADC benefits which ensure at least a minimal subsistence level of life and health for plaintiff and her child. *Ramos* v. *Health & Social Services Bd.*, Civil No. 67-C-329 (E. D. Wis., filed Nov. 7, 1967). Moreover, since the enforcement of the home visit regulation must inevitably cause irreparable injury to all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes, a restraining order protecting them from the denial or termination of such grants based upon this refusal is equally necessary pending the determination by the full court of plaintiff's application. The harm to plaintiff and

others similarly situated from continued enforcement of the regulations challenged herein is both clear and abundant, while the cost to the State and City is obscure and minimal. *Hernandez* v. *Freeman,* Civil No. 50333 (N. D. Cal., filed Dec. 30, 1968); *Burns* v. *Montgomery,* Case No. 49018 (N. D. Cal., filed April 19, 1968); *Griffin* v. *Bonin,* Civil No. 13,521 (W. D. La., filed March 7, 1968); *Alvardo* v. *Dunn,* Civil No. 12,399 (D. Conn., filed Feb. 14, 1968); *Ramos* v. *Health & Social Services Bd., supra.*

Finally, in that this Court is satisfied that: a) the class which plaintiff seeks to represent is so numerous that joinder of all members is impracticable; b) there are questions of law common to the class; c) the claims of the representative party are typical of the claims of the class; d) the representative party will fairly and adequately protect the interests of the class; and e) the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole, this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23.

In order to effectuate the terms of this opinion, a temporary restraining order has been entered effective at 4:00 P.M. on June 13, 1969.

So ordered.

Dated: New York, New York, June 13, 1969

CHARLES W. TENNEY
U.S.D.J.

FOOTNOTES

[1] "The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistnce or care as the basis for determination of initial eligibility.

a. Determination of initial eligibilty shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

Temporary Restraining Order.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2284(3), for a temporary restraining order restraining Defendants Wyman and Goldberg from discontinuing or reducing public assistance grants to Plaintiff and the class she represents, for refusing to consent to a welfare official's entry into her home without a valid search warrant. This motion having been considered by this Court:

Upon the pleading, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, and upon the finding by this Court that (1) substantial questions have been raised as to the constitutional validity of the State Statute and regulations requiring home visits as a condition for the receipt of public assistance, which require further consideration by a statutory three-judge Court, and (2) Plaintiffs are now suffering irreparable injury when their aid is reduced or discontinued upon their failure to allow the welfare official to enter their homes, it is

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination by a statutory three-judge Court of the consitutionality and validity of the State Statute and regulations requiring a home visit as a condition to the continued receipt of public assistance that:

1. Defendants, their successors in office, agents and employees, and all persons in active concert and participation

with them, are hereby restrained from entering into the dwelling places of plaintiffs and other similarly situated, without obtaining a valid Search Warrant issued upon probable cause or on the basis of consent of the recipient freely given after the employee or welfare official has clearly stated to the recipient that failure to give such consent will not result in discontinuance, reduction or denial of welfare assistance or criminal prosecution.

Dated: New York, New York, June 13, 1969.

CHARLES W. TENNEY
U. S. D. J.

Effective 4:00 P.M. June 13, 1969.

CWT.

Affidavit of Archery Delcon.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARCHERY DELCON, being duly deposed and sworn, says:

1. I reside at 186-16 Ridgedale Street, Queens, New York, and have five children: Patricia, age 16, Wilhelmena, age 13, Ted, age 10, Ned, age 10 and Leroy, age 8.

Affidavit of Archery Delcon.

2. I have been a recipient of public assistance for myself and by family since 1956.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these vists. I often don't know who the caseworker will be because they are changed so often. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse

to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Archery DeLeon on June 18, 1969.)

Affidavit of Hattie Florence.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HATTIE FLORENCE being duly deposed and sworn, says:

1. I reside at 387 Lenox Avenue, New York, New York and have five children: Arthur, age 12, Amelia, age 9, Anita, age 10, Carlaise, age 5 and Donna, age 8 months.

2. I have been a receipient of public assistance for myself and my family since 1964.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it

would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Hattie Florence, on June 18, 1969.)

Affidavit of Ernestine Cody.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ERNESTINE CODY, being duly deposed and sworn, says:

1. I reside at 607 Willoughby Avenue, Brooklyn, New York, and have two children: Cheryl, age 7 and Gracie, age 4.

2. I have been a recipient of public assistance for myself and my family since 1967.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have

always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for

special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Ernestine Cody, on June 18, 1969.)

Affidavit of Jean Royal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JEAN ROYAL, being duly deposed and sworn, says:

1. I reside at 16 Cornelia Street, Brooklyn, New York and have four children: Evan, age 17, Rolein, age 15, Debra, age 13, and Caroline, age 3.

2. I have been a recipient of public assistance for myself and my family since 1958.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Jean Royal on June 18, 1969.)

Affidavit of Ethel McMillian.

UNITER STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ETHEL MCMILLIAN being duly deposed and sworn, says:

1. I reside at 1556 Saint Marks Avenue, Brooklyn, New York, and have four children: Crystal, age 5, Katrina, age 4, Roneque, age 2 and Henry, 10 months.

2. I have been a recipient of public assistance for myself and my family since 1963.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of

my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Ethel McMillian on June 18, 1969.)

Affidavit of Deloris Macklin.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DELORIS MACKLIN, being duly deposed and sworn, says:

1. I reside at 1248 Washington Avenue, Bronx, New York, and have four children: Remay, age 9, Charlie, age 7, Shelia, age 2½, and James, age 5.

2. I have been a recipient of public assistance for myself and my family since 1964.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

Affidavit of Deloris Macklin.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Deloris Macklin on June 18, 1969.)

Affidavit of Mattie West.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MATTIE WEST, being duly deposed and sworn, says:

1. I reside at 963 Washington Avenue, Bronx, New York and have five children: Caroline, age 10, Gary, age 9, Kettey, age 4, Gearth, age 6 and Amend, age 2.

2. I have been a recipient of public assistance for myself and my family since 1967.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of

my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Mattie West on June 18, 1969.)

Affidavit of Barbara Belcher.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BARBARA BELCHER, being duly deposed and sworn, says:

1. I reside at 117-19 142nd Street, Ozone Park, Queens, New York and have six children: Eric, age 8, Kevin, age 7, Michelle, age 6, Crug, age 5, Karen, age 4, and Debora, age 3.

2. I have been a recipient of public assistance for myself and my family since 1964.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have com-

pany. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Barbara Belcher, on June 18, 1969.)

Affidavit of Odessa Singleton.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ODESSA SINGLETON, being duly deposed and sworn, says:

1. I reside at 172-53 125th Avenue, Springfield Gardens, Queens, New York and have six children: Ronald, age 9, Michael, age 8, Gregory, age 7, Marc, age 5½, Jonathan, age 4, and Nicole, age 21 months.

2. I have been a recipient of public assistance for myself and my family since 1964.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of

my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Odessa Singleton on June 18, 1969.)

Affidavit of Alberta Miller.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALBERTA MILLER, being duly deposed and sworn, says:

1. I reside at 33 Cranite Street, Brooklyn, New York, and have four children: Sheena, age 12, Tezell, age 9, Sharlena, age 6 and James, age 5.

2. I have been a recipient of public assistance for myself and my family since 1959.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him a[illegible] can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my com-

pany and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and recent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Alberta Miller on June 18, 1969.)

Affidavit of Jacqueline Lacey.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JACQUELINE LACEY, being duly deposed and sworn, says:

1. I reside at 141-11 Foch Boulevard, Queens, New York and have eight children: Bennie, age 13, Kevin, age 12, Donald, age 10, Ronald, age 10, Ronita, age 8, Jack, age 6, Joseph, age 5, and Teear, age 1.

2. I have been a recipient of public assistance for myself and my family since 1964.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to in that time. It's very embarrassing to me if the caseworker comes when I have company.

Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especially when the questions they ask are personal ones. I'm resentful and embarrassed when a worker look around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Jacqueline Lacey on June 18, 1969.)

Affidavit of Margie Miller.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARGIE MILLER being deposed and sworn, says:

1. I reside at 825 Columbus Avenue, New York, New York and have five children: Kevin, age 9 months, Kim, age 8, Karen, age 8, Kenneth, age 7, and Igle, age 5.

2. I have been a recipient of public assistance for myself and my family since 1967.

3. Since I have been receiving public assistance, caseworkers have regularly visited me in my home. I have always let them come in and have discussed with them my eligibility, my needs and whatever else they have wanted to talk about.

4. I never know just what will happen or what will be talked about during these visits. I often don't know who the caseworker will be because they are changed so often.

5. Most often I don't know the caseworker is coming until he knocks on the door. When he comes unexpectedly, I have to drop what I'm doing to talk to him and can't do the things I planned to do in that time. It's very embarrassing to me if the caseworker comes when I have company. Sometimes the worker interviews me in front of my company and sometimes he even asks questions of the people who are visiting me.

6. The caseworker often asks questions in front of my children about things I'd rather not talk about with my children there. Sometimes he asks very personal questions that I'd rather not answer at all but especially don't want to answer in front of my children.

7. I don't like to have caseworkers in my house and resent having to talk to them in front of my children or in front of visitors especally when the questions they ask are personal ones. I'm resentful and embarrassed when a worker looks around my house or asks questions of my children or of people visiting me.

8. I let the caseworker in and answer his questions because I feel I have no choice. I am afraid that if I refuse to let him in my assistance might be cut off. I am also afraid that if I refused to let a caseworker in it would make him angry. I cannot afford to have my caseworker angry at me because I am so dependent on him. He is the only contact I have with the Welfare Department and he is the person who can approve or disapprove my requests for special grants to buy the things my family needs and my requests for other things like higher rent to pay for a better apartment. I must do what the caseworker asks. I am fearful that if I don't let the caseworker into my home my welfare can be terminated or reduced.

(Sworn to by Margie Miller on June 18, 1969.)

Defendant Goldberg's Answer.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Defendant, JACK R. GOLDBERG, by his attorney J. LEE RANKIN, Corporation Counsel, for his answer to the complaint herein:

FIRST: Denies the allegations contained in the paragraph of the complaint marked "1" except that plaintiffs are allegedly seeking relief under Rule 57 of the Federal Rules of Civil Procedure authorized by Title 42 U.S.C. § 1983.

SECOND: Denies the allegations contained in the paragraph of the complaint marked "2" and respectfully refer the court to the section quoted therein for the full text and legal effect thereof.

THIRD: Denies the allegations contained in the paragraph of the complaint marked "3" except that plaintiffs are seeking the convening of a three judge district court.

FOURTH: Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the complaint marked "4" except that the AFDC program is administered and supervised by Defendants and that plaintiff Barbara James has received Public Assistance in the past.

Defendant Goldberg's Answer.

FIFTH: Denies the allegations contained in the paragraph of the complaint marked "5" except that plaintiffs seek to make this a class action.

SIXTH: Denies the allegations contained in the paragraphs of the complaint marked "10", "12", "13" and "14".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE DEFENDANT, JACK R. GOLDBERG RESPECTFULLY ALLEGES:

SEVENTH: The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendant, Goldberg, respectfully prays for a judgment dismissing the complaint.

J. LEE RANKIN,
Corporation Counsel,
Attorney for Defendant Goldberg.
Office & P. O. Address:
Municipal Building,
New York, New York.

By: LEONARD BERNIKOW,
Assistant Corporation Counsel.
Tel. No. 566-2192

New York, N. Y., June 26, 1969.

Affidavit of Jack R. Goldberg.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JACK R. GOLDBERG, being duly sworn, deposes and says:

1. That I am the Commissioner of Social Services of the City of New York, and that my office is located at 250 Church Street, New York, New York.

2. That as Commissioner I am responsible for the administration of all public assistance and care within the City, in accordance with the provisions of the Social Services Law, rules of the State Board of Social Welfare, and regulations of the State Department of Social Services.

3. That plaintiff and her child are recipients of Aid to Dependent Children, and that Section 350 subdivision 3 of the Social Services Law requires that supervisory visits shall be made to the homes of such recipients in accordance with rules of the Board and regulations of the Department.

4. That the State Department of Social Services requires home visits in connection with initial determination of eligibility for public assistance (18 NYCRR § 351.10) and investigation of continuing eligibility (18 NYCRR § 351.21), and that the home situation in an ADC case be

one in which the physical, mental and moral well-being of the children in the family is safeguarded.

5. That in accordance with the Social Services Law and regulations and policy guidelines of the State Department of Social Services, investigations of eligibility are limited to factors reasonably necessary to insure eligibility. Caseworkers are instructed not to enter a home of an applicant or recipient by force, under false pretenses, or without permission, and not to make a search of the home by looking into closets and drawers.

(Sworn to by Jack R. Goldberg, as Commissioner of Social Services of the City of New York on June 25, 1969.)

Affidavit of Leonard Bernikow.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD BERNIKOW, being duly sworn, deposes and says:

1. I am an assistant corporation counsel in the office of J. LEE RANKIN, Corporation Counsel of the City of New York.

2. I have been assigned to the defense of the above captioned matter on behalf of the defendant Jack R. Goldberg.

3. I was first notified, and only by accident, of the dates on which oral argument was to take place before the three judge bench and when papers had to be filed, on June 23, 1969. I was further informed that all papers had to be filed on June 26, 1969. Due to the relatively short time and the press of other important matters, I have been unable to file a brief.

4. Accordingly, I would ask leave of this Court to rely on the brief submitted by the Attorney General which I feel covers the main issues raised by this action.

(Sworn to by Leonard Bernikow on June 26, 1969.)

Defendant Wyman's Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The defendant George K. Wyman, Commissioner of the State of New York Department of Social Services, by his attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, answers the complaint as follows:

FIRST DEFENSE

The defendant Wyman denies each and every allegation contained in the complaint except:

1. Denies knowledge or information sufficient to form a belief as to the allegations of the paragraph numbered "1" except admits that plaintiffs seek injunctive and declaratory relief under Rule 57 of the Federal Rules of Civil Procedure authorized by Title 42 U.S.C. § 1983.
2. Denies so much of the paragraph numbered "2" as alleges that the sections cited confer jurisdiction of this case on this Court.
3. Denies the allegations of the paragraph numbered "3" except insofar as it alleges that plaintiffs seek the convening of a three-judge district court.
4. Admits so much of the paragraph numbered "4" as alleges that the defendants administer the New York State program of Aid to Families with Dependent Children and that at some relevant times

plaintiffs were receiving public assistance but denies any implication that plaintiffs were at all times entitled to such assistance and denies knowledge or information sufficient to form a belief as to the resources of plaintiffs.

5. Denies the allegation of the paragraph numbered "5" except admits that plaintiffs seek to prosecute this case as a class action.

6. Admits the allegations of the paragraphs numbered "6", "7" and "8" except respectfully refers the Court to the relevant statutes for their meaning and legal effect and for the scope and the duties of the named defendants.

7. Denies the allegations of the paragraph numbered "9" except admits that a letter was sent to plaintiff requesting an appointment on the date recited and that such a visit was refused.

8. Denies the allegations of the paragraph numbered "10".

9. Admits the allegations of the paragraph numbered "11".

10. Denies the allegations of the paragraphs numbered "12", "13", and "14".

SECOND DEFENSE

The complaint fails to state a claim upon which relief against the defendant Wyman can be granted because the practices and policies of the defendant Wyman are in all respects in accordance with the requirements of federal law and regulations.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted against the defendant Wyman because the policies and practices of the defendant Wyman are explicitly designed to protect the constitutional rights of welfare applicants and recipients.

1. It is the explicit policy of the defendant Wyman that all investigations into eligibility or continuing eligibility shall be conducted by lawful means without infringing upon the individual's civil rights.
2. It is the explicit policy of the defendant Wyman that under no circumstances shall force, threat of force or false statements be used to obtain entry into the home of an applicant or recipient or to obtain evidence of any nature.
3. It is the explicit policy of the defendant Wyman that all investigations must be conducted in a manner that will not violate the applicant's or recipient's right of privacy or dignity, or harass him, or violate his constitutional rights.

FOURTH DEFENSE

The investigatory practices and policies authorized by the defendant Wyman are based upon federal policy requirements, are reasonable and necessary for the sound administration of the welfare system and are not violative of any statutory or constitutional rights of applicants for or recipients of welfare assistance.

1. Federal and state law require that assistance be given to those who seek it and establish that they qualify for it.

2. It is the responsibility of the local agency to ascertain the need for assistance as well as for continuing eligibility.

3. The primary source of information regarding eligibility must be the applicant or recipient.

4. Both state and federal law impose a continuing obligation upon a recipient to provide the information necessary to verify his continuing eligibility and needs.

5. If a recipient is unwilling or reluctant to have the agency help resolve a question of eligibility, the agency may not be able to determine eligibility and would have no recourse but to terminate assistance.

6. Termination of assistance because of inability to verify eligibility is a necessary concomitant to the requirement that assistance is to be given only to those who establish that they qualify.

7. Informing the recipient of the possibility that assistance may be terminated because of inability to verify eligibility is necessary to insure that the recipient understands the possible consequences of his unwillingness to provide verifying information to help resolve a question of eligibility.

8. Decision by the recipient to cooperate in verifying eligibility after being so informed is not the result of coercion or intimidation by the agency and the recipient's cooperation does not result in an unconstitutional invasion of privacy.

FIFTH DEFENSE

Plaintiffs have been accorded full protection of their constitutional rights by defendants as the record of plain-

tiff Barbara James at the New York City Department of Social Services demonstrates. (A copy of the case report is submitted herewith as Exhibit "1").

SIXTH DEFENSE

The complaint fails to state a justiciable controversy or to state a claim on which relief can be granted.

SEVENTH DEFENSE

Plaintiffs have failed to exhaust their administrative remedies.

WHEREFORE, the defendant Wyman respectfully prays for a judgment dismissing the complaint.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant
Commissioner Wyman
Office & P. O. Address
80 Centre Street
New York, New York 10013

By

.....

BRENDA SOLOFF
Assistant Attorney General
Telephone No. 488-7402

(Verified by Brenda Soloff on June 26, 1969.)

Affidavit of Eleanor Walsh.

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

ELEANOR WALSH being duly sworn deposes and says:

1. She is Deputy Commissioner of the Department of Social Services of the State of New York and head of the Division of Family Services.

2. She makes this affidavit in opposition to plaintiffs application for a permanent injunction restraining and enjoining the city and state commissioners of social services from enforcing rules and regulations of the state department which require local districts to conduct home visits to recipients homes for several reasons.

3. Specifically department regulations 351.10 and 351.21 which were duly adopted by the State Department of Social Services pursuant to Social Services Law § 34 as amended on May 1, 1967 provide that social investigation including home visits shall be made prior to the first grant of assistance and thereafter throughout the recipients eligibility for a variety of reasons and except under certain defined conditions which do not obtain in this case.

4. Home visits are a primary responsibility of the local district with regard to eligibility and case work in the first instance subject to the regulations of the department pursuant to Social Services Law § 134.

5. The state in turn is required to observe federal statutes and regulations in regulating local districts. For

the reasons hereinafter stated reasonable home visits are probably a concomitant of the social services process nevertheless there is authority for such visits in the Social Security Law expressed as follows:

Section 402(a)(14) of the Social Security Act

> "(14) provide for the development and application of a program for such family services, as defined in section 406(d), and child welfare services as defined in section 425, for each child and relative who receives aid to families with dependent children, and each appropriate individual (living in the same home as a relative and child receiving such aid whose needs are taken into account in making the determination under clause (7)), as may be necessary in the light of the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative, and individual to attain or retain capacity for self-support and care and in order to maintain and strengthen family life and to foster child development . . ."

The Federal Handbook of Public Assistance Administration implements the Act in section 2200(d)(1)(2)(3), (e)(1)(2) section 2300(a)(e)(3) and there federal regulations in turn are implemented by 18 NYCRR 351.1, 351.2, 351.7, 351.10, 351.21.

It should be noted that these provisions acknowledge home visits as an accepted practice. Indeed the successful administration of a plan of public assistance without home visits is difficult to conceive. Both federal (Federal Handbook § 2300) and state (18 NYCRR 351.1(d)) regulations rule out home visits which violate an individuals privacy, personal dignity or constitutional rights.

6. There are two main reasons for home visits—determination of eligibility and determination of the need for services.

(a) *Determination of eligibility*

In the determination of eligibility financial resources and all factors of eligibility, other than need, must be explored. This includes reviewing any assets, both real and personal which the applicant or recipient owns. Bank accounts, life insurance, stocks and bonds, household furniture and furnishings are a partial listing.

The factors of eligibility other than need, include the age and relationship of children in ADC and age of adults in OAA and AD. A review of birth certificates is required for children and any appropriate evidence of age of adults. A listing of all items which are required could be furnished and applicant could bring them to the agency office. In the event something was omitted, it would entail an additional visit to the office.

Since residence in a district is a requirement, the only way it may be verified that an applicant resides at a particular address is to visit the home.

Generally, a person is more relaxed in his own home and making required contacts in the home assures privacy.

(b) *Need for Services*

The Social Services Law requires public welfare officials to provide assistance (which includes aid, care, support and service) to persons unable to maintain themselves, and also requires that the amount, nature, and manner of providing assistance be determined with due regard to the conditions existing in each case.

Home conditions are highly relevant and must be seen to be understood and evaluated. One condition of eligi-

bility for ADC is a home situation in which the child's physical, mental and moral well-being will be safeguarded. Hence, the home must be evaluated as to these factors.

An agency may provide recipients with a list of services available, but the recipient may not be aware or willing to acknowledge his need of a particular service, or for some other reason may not request it. On the other hand, an alert and interested worker in a home visit may identify needs for which the agency may offer help, e.g. need for more adequate furnishings (which may be obtained from another community resource) or for repair of or removal from unsafe conditions, such as rickety steps or flooring, too many stairs for heart patient, unsafe heating devices, or an aged or infirm person living in an isolated location. Help can be offered to improve housekeeping or child care though service might never be requested.

In addition, the inter-personal relationships of the family members and their effect on various family members may be observed. This permits an evaluation of the need for and the offering of appropriate services, e.g. placement of an aged or disabled person, or a defective child, services of a homemaker, and the obtaining of necessary medical care.

WHEREFORE deponent respectfully requests that the injunction against home visits be dissolved and the complaint dismissed and for such other and further relief as to the court seems just.

(Sworn to by Eleanor Walsh on June 26, 1969.)

Motion by Defendant Wyman.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the summons and complaint and order to show cause, the briefs and orders herein and upon all prior proceedings heretofore had, the undersigned will move this Court on the 30th day of June, 1969 before the statutory three-judge court in Room 705, United States Courthouse, Foley Square, New York, New York, for an order vacating, or in the alternative, modifying the temporary restraining order herein and for an order vacating the class action determination herein.

Dated: New York, New York, June 26, 1969.

Yours, etc.,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Defendant Wyman,
Office & P. O. Address,
80 Centre Street,
New York, New York 10013.

By BRENDA SOLOFF,
Assistant Attorney General.

To:

DAVID GILMAN,
Attorney for Plaintiffs,
MFY Legal Services, Inc.,
759 Tenth Avenue,
New York, New York 10025.

HON. J. LEE RANKIN,
Corporation Counsel,
Municipal Building,
New York, New York 10007.

Attention Mr. Bernikow

Minutes of Hearing, June 30, 1969.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Before:

HON. WILFRED FEINBERG, Circuit Judge,
HON. EDWARD C. McLEAN, District Judge,
HON. CHARLES H. TENNEY, District Judge.

New York, June 30, 1969;
2:00 o'clock p. m.

APPEARANCES:

DAVID GILMAN, Esq.,

JONATHAN WEISS, Esq.,
MFY Legal Services, Inc.
and

LEE A. ALBERT, Esq.,
Center on Social Welfare Policy & Law,
Attorneys for Plaintiffs.

LOUIS J. LEFKOWITZ, Esq.,

Attorney General of the State of New York,
Attorney for George K. Wyman, individually and as Commissioner of the State of New York, Department of Social Services;

Brenda Soloff, Esq. Assistant Attorney General,
of Counsel.

Minutes of Hearing, June 30, 1969.

J. Lee Rankin, Esq.,

Corporation Counsel for the City of New York,
Attorney for Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York.

Leonard Bernikow, Esq., Assistant Corporation Counsel, of Counsel.

Judge Feinberg: Ladies and gentlemen, I understand that the State has asked for 15 minutes; is that correct?

Miss Soloff: I think that is correct, your Honor.

Judge Feinberg: And that plaintiffs have also asked for 15 minutes; is that correct?

Mr. Gilman: That is correct.

Judge Feinberg: Are there any other requests for time?

Mr. Bernikow: Your Honor, I represent the Corporation Counsel and I may request anywheres from five to ten minutes.

Judge Feinberg: Would you state your name for the record.

Mr. Bernikow: I have already given it to the court reporter.

Judge Feinberg: Fine. All right.

Mr. Gilman: Your Honor, we would like to reserve five of our minutes for rebuttal, if that is possible.

Judge Feinberg: All right. Let us proceed.

Mr. Gilman: My name is David Gilman. I am the attorney for the plaintiffs in this action.

Before I begin, I would like to comment, first, upon the submission by the State of the entire case record of the named plaintiff, Mrs. James, as part of their memorandum in this action. That record contains not only confidential information about the family, which would now become part of the public record, but that could be picked up by anyone who would like to read the file; but it is grossly

inaccurate, and not only that, it is irrelevant to any of the issues that are presented to this Court. I would take extreme exception to that submission.

This suit was commenced in this court solely to seek federal remedies because of the violation of federal rights. Those federal rights involve illegal search and seizure of the named plaintiffs and others similarly situated in their homes, and invasion of the sanctity of their homes, and invasion of their privacy.

Plaintiffs allege that there are state-wide regulations and a state-wide statute which are involved in this case, with state-wide applicability. It is this statute and these regulations which plaintiffs claim violate their constitutional rights to be free from illegal search and seizure.

The plaintiffs do not question or oppose the promulgation of regulations by defendants, nor do we question how they administer their program. All the plaintiffs request is federal relief when the promulgation of regulations by defendants results in a violation of plaintiffs' right under the Fourth Amendment, the right to be free from illegal search, their right of privacy.

This case is to establish what are the constitutional dimensions and what are the constitutional limitations upon defendants in the administration of their program as it relates to constitutional protections. We claim that the plaintiffs have had unlawful intrusions upon their privacy due to defendants' actions.

Judge McLean: Has there been any intrusion, lawful or otherwise, yet?

Mr. Gilman: Your Honor, we claim that it has been threatened and we have supplemented our papers by affidavits of twelve named welfare recipients who claim that their right of privacy has been threatened by unlawful intrusion.

The plaintiff in this case has had her aid terminated due to the fact that she has refused to allow entrance into her home.

Judge McLean: The welfare worker wanted to go into the house and she did not want them to go, and then their welfare was terminated in accordance with the regulations, as I understand it?

Mr. Gilman: That is correct.

Judge Feinberg: Nobody actually went in at all?

Mr. Gilman: That is right. Because she insisted upon keeping the worker, case worker, out of the home, the welfare worker could not come in based upon that refusal. Aid was then terminated.

Judge Feinberg: She had her hearing after that?

Mr. Gilman: They were was provided under Kelly v. Wyman a prior hearing before termination. She had a hearing at that time and the hearing was resolved in favor of defendants insofar as they had a right to terminate due to her refusal to allow the worker into the house.

Judge Feinberg: So that as far as her case is concerned, you say that a denial of benefits is based upon an unconstitutional theory?

Mr. Gilman: It is unconstitutional. It is conditioning of welfare upon her waiving her constitutional right to keep strangers out of her home. That is her position.

The facts in this case are exactly as we have just outlined them. Mrs. James refused the worker entrance; because of that, there was termination.

We also claim that other members of the class of injured parties, and we mean anyone who is injured either because they have been terminated, because they have denied entrance, or have been threatened to be terminated if they would not allow the worker in; that these threats of denial of assistance or reductions are the violation that we are alleging is unconstitutional in this matter.

Judge Feinberg: The state says it is necesary to have the welfare workers come into the house, among other reasons, to check on the surroundings for the care of the child. They say they have an obligation and if they cannot see the place, how could they fulfill their obligations?

Mr. Gilman: We are not questioning the defendants' obligations to visit the home. All we are saying is that defendants have to meet the constitutional requirements of the Fourth Amendment. If the defendants feel that it is necessary to go in, they have to act properly and constitutionally. That is our position.

Judge Feinberg: Your position is that in order to check on whether or not a proper home is being furnished for a child, they would have to get a warrant in every case?

Mr. Gilman: They would not have to get a warrant in every case, because not every welfare recipient would bar a case worker coming to the home. Many welfare recipients look forward to the worker's visit and invite the worker in. We are saying for those members of the class who do not want the worker to come into the home unless there is an issue of ineligibility or criminal fraud, that worker has to go and get a warrant like everyone else has to go and get a warrant who is conducting an administrative search.

Judge Feinberg: So your position is, it would be proper for the welfare worker to ask to come in and check; it would only be improper if, after the worker were turned down, termination of benefits were threatened?

Mr. Gilman: That is correct. The worker can ask to come in. As long as it is made clear that that is a voluntary act on the part of the recipient. We do not mean by that that the worker can knock on the door and say, "Can we come in or can we not?" They have to make it very clear that if the worker does not come into the home that aid will not be terminated or reduced.

Judge Tenney: For that reason?

Mr. Gilman: For that reason.

It is the plaintiffs' position that historically the home has been deemed a sacred place and that historically and traditionally the sanctity of the home can only be intruded

upon with a valid search warrant or unequivocal consent.

The cases are very clear on that: McDonald, Agnello and Johnson make that clear.

There have been certain traditional exceptions to the warrant requirement, and those are spelled out. Usually in cases of criminal danger, as incident to a valid arrest, if there is going to be a catastrophe, government officials have to step in. Aside from that, the law has been clear over a long period of time. The cases have held two things: One, a person is secure in his own home. A warrant has to be extended before intrusion will be tolerated; and two, a person's privacy is sacrosanct.

Judge McLean: What would the state and welfare people have to show in order to get a warrant?

Mr. Gilman: They would have to show, your Honor, that there is some evidence, some reason to conclude that there is ineligibility or there is criminal fraud or some criminal activity in that home.

Judge McLean: They could not go in just to see whether it is a fit home for the child?

Mr. Gilman: They can go in to see if it is a fit home if they are invited in, but they have to have some reason to believe that that home is not a fit home.

Judge Feinberg: Suppose they are not invited in? That was the hypothetical I posed to you. Is it your idea that they could not get a warrant merely by saying that we want to check on this home and we ask to be allowed in and we were told no? Do you think they would have to show something more to get a warrant?

Mr. Gilman: I am not sure what a judge sitting, before he issued that warrant, would require them to show, and I am not even suggesting that this Court rule on that issue, but I am saying they would have to convince a member of the judiciary that a warrant is necessary in this particular case.

Judge Tenney: Do you think the various acts that are alleged, the various statements concerning the plaintiff that are set forth in the brief, would be sufficient to justify the issuance of a warrant?

Mr. Gilman: On reading the accusations made in the case record, many of those were just pure hearsay. I would not give them much credulence, but I do not want to stand in support on that matter.

Judge Tenney: I agree.

Mr. Gilman: What I am suggesting is, that is going to be a matter that is going to have to be—

Judge Tenney: At least you have a third party involved, a judge or magistrate or somebody, who is going to pass on the sufficiency of the grounds for the search warrant in those cases where admission to the premises is denied, refused?

Mr. Gilman: That is our point, that it should be the judiciary to make that decision, whether a search warrant is warranted, not the executive branch, not the fact that the agency itself decides that this is the kind of case where we have to go into the home and, therefore, they condition the benefits upon that decision.

Judge Tenney: You might have a nice question whether the assertion of a constitutional right by a person having a home would be sufficient in itself for a judge to issue a search warrant. The mere fact they would not let you know without anything more might pose a serious question about whether that in itself is sufficient ground to issue a warrant.

Mr. Gilman: That may very well be the next case that would come up. There is no doubt that is the next question.

But there are other agencies which also have an obligation to check upon the home conditions, especially if there is an issue raised about, well, a child's abuse or criminal activity.

Judge Feinberg: What other agencies are you referring to?

Mr. Gilman: The Society for the Prevention of Cruelty to Children, the Police Department has an obligation if there is criminal activity to take action.

Judge Feinberg: That is criminal activity. But we are faced with the fundamental question here, and that is, if it is the obligation of the state to be concerned about child care before the money is distributed and before someone is declared eligible, then do they have a way of carrying out that obligation?

Mr. Gilman: Yes. Well, our position is that there are two things which are commingled. There is one, the desire of the Welfare Department to establish eligibility; two, there is the desire of the Welfare Department to give social services. It is unclear where one process begins and the other process ends. It is unclear when the worker comes in, are they solely looking at eligibility factors or are they looking at social service factors? It is not only unclear to us but it is unclear to the worker. Because of the intertwining, the commingling of both these functions, it is difficult to pick them out and say this is going to happen, that is going to happen, some sort of isolated surroundings.

Judge Feinberg: When you say "worker," you mean the Welfare Department worker?

Mr. Gilman: The case worker, right. He is the one that makes the home visit. Until these two are separated out, the client never knows if what she responds to when she thinks she is talking about social services may also be a factor in determining her to be ineligible.

Judge Feinberg: You are arguing a position here. What do you think it ought to be to be separated out?

Mr. Gilman: To be separated out, to be very clear, that any welfare recipient who does not wish a worker into the home can refuse. If a worker needs to come into the

home, the worker must get a warrant as well, just as much as a fire inspector or a health inspector would have to get a warrant.

Judge Feinberg: This is on eligibility as well as everything else?

Mr. Gilman: This is on eligiblity as well as everything else, because once the family is deemed to be eligible, once that family is on assistance, then the presumption should not be that they are ineligible unless they prove eligibity all over again every ix months. The Department should have something to come in and say: I think this family is now ineligible.

Judge Feinberg: That is another question. I was directing myself to the first part, eligibility. You think that on that, that the state should have no right to come into the apartment without a warrant unless he recipient, who wants the welfare, says OK?

Mr. Gilman: That is correct.

What plaintiffs claim is in issue in this matter we feel is properly covered by the case of Camera v. Municipal County or Municipal Court of the City and County of San Francisco. We think that is the case that is covered in this matter.

What we are claiming is that the welfare investigator is in the same shoes as analagous to the fire inspector or the health inspector as would be in See v. Seattle, which is the companion case.

It is our position that the rights of the welfare recipient are the same rights as exercised by other citizens. Because the welfare recipient is receiving welfare does not mean that her Fourth Amendment rights are any less.

The Court held in that case that the civil rights, the rights under the Fourth, are not peripheral to the Fourth Amendment, they are substantial, they are strong. We claim that they extend to the welfare client as well.

The defendants seek this Court to render a decision based on a very novel concept. The defendants in this action claim that the standards should not be the traditional standards of warrant of consent, they say the standards should be reasonableness, reasonableness based not upon what we have traditionally understood to be reasonable, but reasonable as seen in light of the needs, the obligations, the purposes of their agency's function. And that, therefore, because they need it, because it is reasonable, they should be able to make a home visit without a warrant.

They continue to push this theory based upon the fact that there is a confidential relationship which is supposed to be created between the worker and the client, and that because of the agency's concern for the family, the Court ought to promulgate a new standard for government agencies such as the Welfare Department from seeking entrance into the home.

Our position is, one, there is not only no authority for that, but it really means that once a right is violated by a government agency, then that is reasonable and that is constitutional; but if it is not violated by a government agency, such as the Welfare Department, then it is unconstitutional. They are asking just because they have legitimate program purposes and they have the concerns of the family that the Fourth Amendment protection should somehow be watered down. And our position is that certainly should not happen.

Therefore, plaintiffs' claim is that if this is an important right, that this is not a peripheral right, that this Court should rule for the plaintiffs in this action to enjoin the Department from making home visits without warrant, without consent and that we wish a preliminary and permanent injunction to that effect.

Judge McLean: Before you sit down, let me ask you again about this warrant, because there is no sense, as far as I can see, in putting the welfare people to the bur-

den of going and getting a warrant every time they want to inspect the house unless the warrant is going to serve some useful purpose.

What do you think they would have to show to get a warrant?

Mr. Gilman: They would have to show a court that there was some evidence of fraud or concealment of funds or some criminal activity involving the child.

Judge McLean: Why should that be? Why shouldn't they have a right to go in and see whether this is a decent home or not without knowledge what they are going to find before they go there?

Mr. Gilman: I have no problem with that at all, your Honor, and they will probably do it in 90 percent of the cases, but we are suggesting that if there is a welfare recipient that feels that home is a sanctified place, a place which is private unto herself, she has a right, like every other citizen, to say you cannot come into my home.

The real question is, does the Welfare Department need that home visit in order to fulfill its legislative and its statutory purposes, and our position is—

Judge McLean: Is that the question, whether they need it or not?

Mr. Gilman: My point is, your Honor, that information which is necessary about the home can be easily secured through conversations and discussions with that welfare recipient at the local welfare center. There is nothing about that home which needs to be seen by the worker or to establish eligibility or establish or to give social services.

The Department makes the allegation they have to visit. Well, why? In order to inspect, in order to search. That is our position.

Judge Feinberg: Mr. Gilman, I wonder if you can enlighten us, and I intend to ask the state the same questions.

How many families currently receive welfare in New York State? Do you have any idea?

Mr. Gilman: I think there is a million-two or a million-three.

Judge Feinberg: In how many of those cases would you imagine home visits are made?

Mr. Gilman: I would say they are by statute made in just about every case.

Judge Feinberg: Every case.

In how many of those cases would you say there would be resistance to the home visit if it was made clear that the welfare recipient does not have to allow the welfare worker in?

Mr. Gilman: I would be speculating, your Honor.

Judge Feinberg: Have you any idea?

Mr. Gilman: No.

Judge Feinberg: All right.

Miss Soloff: May it please the Court, with respect, first, to Mr. Gilman's objections to our introduction of records, I think that it can first be said that the named plaintiff at least has waived any claim of confidentiality by bringing this proceeding; and in the second place, I think that the record could be protected from further public scrutiny if an application were made.

Judge Feinberg: I took it that such an application was being made.

Is that right, Mr. Gilman?

Mr. Gilman: That is correct.

Judge Feinberg: Do you have any objection to the sealing of those records for the time being?

Miss Soloff: None at all, your Honor.

Judge Feinberg: All right.

Miss Soloff: But I do think that the record is not irrelevant to the issues in this case.

Judge Tenney: This is merely sealed so far as the public is concerned, not so far as the Court is concerned. The record is sealed.

Miss Soloff: That is what I wanted to clear up.

Judge Feinberg: We will consider those documents as sealed, then, for the time being until the Court acts further on this proceeding.

Miss Soloff: Fine, your Honor.

As has been already pointed out several times today, and I won't belabor it, what we are dealing here with is AFDC assistance, which is Aid to Families with Dependent Children, and the object in this program, as in all such programs, is to provide assistance to those who are eligible so long as that assistance is necessary. Eligibility for assistance here depends on the children and it depends on the children in the home. The federal statutes make this quite clear, the state statutes and regulations make this quite clear.

In essence, it insures that these children can be raised at home with their families instead of anywhere else.

Public assistance is not a program of automatic eligibility for all residents; it depends on eligibility being established.

Judge Feinberg: Why can't that be done in an office rather than by a visit to the home?

Miss Soloff: This is really a policy consideration, I think, more than a constitutional consideration. It might be possible for the state to say we will take your word for what standards of eligibility are, whether you are living in the home, the family composition, your needs, the welfare of the child. It might be possible. The state has seen fit, and the federal government certainly encourages if not absolutely requires, to say we want to see the home. We want to make sure that is where you are living, we want to make sure that the services that you are getting are sufficient, we want to make sure that the child is all right.

Judge Feinberg: Miss Soloff, what is it exactly that is being verified? No, 1, I suppose, is that there is such a residence where someone exists?

Miss Soloff: That is right. That there is such a residence.

Judge Tenney. There are other ways of ascertaining that.

Miss Soloff: This is the most direct way. It prevents going to collateral sources—

Judge Tenney: Sometimes it has to give way to maybe a little more inconvenience if you are treading on some constitutional rights here.

Miss Soloff: Verification by direct contact with the client, it would seem to me, if we are talking about privacy, is far more desirable than going to some collateral source, than making inquiries about somebody from a third person.

Judge Feinberg: First of all, there is residence?

Miss Soloff: First of all, there is residence. There is family composition.

Judge Feinberg: Whether there are children, family composition?

Miss Soloff: That is right.

Judge Feinberg: I should have realized you and the other attorneys in the case know the terms a lot better than we do.

Miss Soloff: I am just learning them all; it has been a very educational two weeks.

Judge Feinberg: Isn't that something, for example, that frequently gets referred to on a federal tax return when you are claiming exemptions?

Miss Soloff: I would think so; I do not know.

Judge Feinberg: Offhand, would you say that the Internal Revenue Department would have a right to send an investigator into your house to find out if your claim of an exemption is a proper one?

Miss Soloff: I do not know, your Honor. I really do not know. But the other things that must be verified are

the physical setup of the apartment, is it a suitable apartment, is it physically safe for the child.

Judge Feinberg: What generic term do you welfare experts use for that? Safety or child care or surroundings or what?

Miss Soloff: I would have to call a welfare expert. I am being descriptive rather than absolutely technical, but I think that that is an accurate description.

Judge Feinberg: Whether the surroundings are suitable?

Miss Soloff: Whether the surroundings are suitable, physically, emotionally or morally.

Judge Tenney: A building inspector could not just walk in, could he, under these decisions just cited to see—

Miss Soloff: This is more than a building inspector, your Honor.

Judge Tenney: —whether it was safe for anybody to live in there? But apparently welfare case workers can go in just to see if it is suitable for the child.

Miss Soloff: They also have to verify the health of the child, if the child is all right, if any goods and services that the client may not be aware of are needed. I think this is more fully set forth, your Honor, in the affidavit of Miss Walsh.

Judge Tenney: Are these case workers physicians? Can't some requirement be made that the child reports to some health center for a physical examination?

Miss Soloff: I believe there are such requirements, your Honor.

Judge Tenney: Do they have to go into the home? Do the children have to be in the home when the mother is there? Is that required? Maybe the children are away somewhere.

Miss Soloff: If the children are in school, I believe arrangements are made to see the child.

Judge Tenney: That can be covered without going into the home.

Miss Soloff: The question of whether or not these can be done another way at much more time and with far less reliability as to the results is, I think, not the issue here. I think the issue is whether or not this is a reasonable requirement and I do not think there is anything novel in the concept of reasonableness as the touchstone for this sort of inquiry, both as to the regulation itself and as to whether or not it allegedly impinges on any constitutional right.

Judge Tenney: Isn't unreasonable pretty well restricted now to the reasonable searches as one with a warrant, a search warrant, except in certain very strictly and gradually more limited areas?

Miss Soloff: Most of the discussion in this area, of course, is in the criminal area, which this is not, although Mr. Gilman seems to be trying to turn it into a criminal inquiry and limiting the scope of the inquiry that can be made. First he says yes—

Judge Tenney: Fraud is involved here, isn't it?

Miss Soloff: No, it is not. This is not the thrust of the inquiry at all, and certainly not criminal prosecution. That is not the thrust of the case worker's visit. The case worker is not a policeman and the state does not want to turn him into one.

Now, apparently he says, well, the state does have this obligation to verify this material, but then when it comes to pinning him down as to what a warrant would contain —and I would like to get to that a little more fully in a moment—he says yes, it would have to be by criminal standards. Well, that is just vitiating the whole state policy which, as I said, does have very reasonable objectives.

Judge Feinberg: Miss Soloff, what I am curious about is this suitable surroundings problem, because it does seem to me that whereas you could get evidence as to residence

or information as to residence and family composition pretty easily, by having the welfare recipient go somewhere and give it to you and put it on a form, suitable surroundings, I would think, would be hard put to check if you did not see it eventually. What do you do? What do the welfare people do if they find that the surroundings not suitable? What is it that the remedy is?

Miss Soloff: I suppose there are several remedies. Again, I have not pushed my expertise far enough to give you a definitive answer, and if witnesses or more affidavits are required, we would be willing to provide them, but—

Judge Feinberg: I just want a general idea.

Miss Soloff: Let me say this, if it is simply a question of the physical layout of the apartment, why then, they would help the client to move, to find suitable surroundings. If other agencies need to be called in for services, then there can be a referral to other agencies.

Judge Feinberg: Like what other agancies?

Miss Soloff: I would think those having more directly to do with either child or household services.

The Court: I see.

Miss Soloff: Or medical services. So that this could be the springboard, in other words. As I said before, the client may well not know what is available or what he needs.

Judge Feinberg: I am aware of that point. What I am getting at is this: You are faced with a request for aid and to determine eligibility you have to go through various steps, and one of them is to look at the surroundings. If you think the surroundings are not adequate, would you deny the aid? That is what I am trying to find out.

Miss Soloff: This touches the question of whether or not the homelife can be so conducted, so adjusted, let us say, that the child can remain in the home. I think that might be the ultimate inquiry in a number of cases.

Judge McLean: What happens if you cannot?

Miss Soloff: There may have to be court proceedings with respect to the child.

Judge McLean: Take him out and put him in an institution?

Miss Soloff: That would be the ultimate if the home could not be brought within the standards of the statute, but I am not saying that that is anything like what is the situation in this case.

What I am saying is that might be an ultimate result. Now, others, as I see it, might be serviced.

With respect to denying aid, that would be really a question of need establishing the need and the rest of it.

Judge Feinberg: That part of the problem I understand.

Miss Soloff: I do not think there would a turning and walking away because the homelife is unsuitable.

I think, though, to get back to this Fourth Amendment idea, that to argue that the home visit is an invasion of privacy essentially begs the question, because we have to go to the reasonableness of what is required. Now, it is conceded that information is required to be given. This already is some limitation on privacy, and the plaintiffs concede, yes, they do have to provide information, but they in effect deny the relevance of the home to this information.

Judge Tenney: Isn't it reasonable for a health inspector and a building inspector to check?

Miss Soloff: Yes, and the Supreme Court has so held. They absolutely upheld the area search. I will get to the question of the warrant in that case as opposed to the warrant in this case.

But there is no question that the reasonableness of the inquiry was upheld by the Supreme Court in those cases.

Judge Tenney: But not without a warrant?

Miss Soloff: Not without a warrant in those cases, but this case is distinguishable.

Judge Tenney: That is what we are coming to here. It is just a different type of reasonableness, depending on whether you are a welfare worker or housing inspector.

Judge Feinberg: How are they distinguishable?

Miss Soloff: In the first place, the Supreme Court limited them to that kind of search. Those statutes were enforceable by criminal sanctions. You had a general area search. And here we said the specific standard would have to be a criminal standard. You have a much closer relationship between the welfare client and the agency. This is only one agency that we are talking about, the one with the close relationship. And between a fire inspector and the ordinary building owner.

Judge Tenney: I do not want to interrupt, but, as I read your regulations or instructions to your case workers, that they are not to look in closets or bureaus or anything?

Miss Soloff: That is right.

Judge Tenney: Why not?

Miss Soloff: Because that would be an undue invasion of privacy which the Department has deemed is not necessary.

Judge Tenney: It seems to me that the Welfare Department does have some misgivings.

Miss Soloff: No, I think the Welfare Department has an idea of the dignity of the individual which they are seeking to conserve at the same time as they are trying to carry out their legitimate functions. They are striking I think, a perfectly reasonable balance. They do not allow forced entry, they do not allow midnight raid, they do not allow any of the things which have been attacked so far in any of the other cases, and there is no indication that that occurred here.

Judge Tenney: There is no association with those?

Miss Soloff: Now, the Court in Camera prescribed the need for warrant as allowing the homeowner to verify the need for the entry, the authority by which the entry was made and the scope of the entry.

The Second Circuit, in Matter of Colonnade Catering Corporation, looked at a statute which is not dissimilar to this in that it permitted an inspection of licensed premises, that was, but the rationale was very similar. It said in that case the statute is sufficiently narrow so that there is no question of the scope of the authority. The relationship between the inquiring agent and in that case the licensee was sufficiently defined so that the licensee or the homeowner, I believe the Court indicated, would know who this was and what the scope of his authority was.

One of the things that I think is perfectly clear from the regulations and the documents before this Court is that the homeowner or the client does know that these visits will be made, does know the authority by which they are made, and does know the scope of them. As I have said, it is a sufficiently narrowly drawn statute so that it falls right within, I think, the Colonnade case as far as the necessity for warrant in those cases. And it is distinguishable from Camera, but it is distinguishable from Camera for a number of other very important reasons, and that is that the warrant in a situation like this would really be anathema to the whole structure of the system that was trying to be administered. It would turn workers into—

Judge Tenney: The beginning of a warrant would certainly flag the Welfare Department that there might be some reason to use permitted methods of investigation to build up a sufficient case to justify the issuance of a warrant.

Miss Soloff: But it is not the purpose of the Department to build up a case to start prosecution or to do any—

Judge Tenney: Whatever it is, they want to get into the apartment.

Miss Soloff: They want to get into the apartment for reasons which are clearly specified and beyond which there is no indication that any worker has gone.

What would a warrant solve? It would—

Judge Tenney: Constitutional violations.

Miss Soloff: There are two claims basically that are made, or rather one basic claim has been made in this complaint, one claim at all, and that is questions are asked during home visits which the named plaintiff here and the other twelve feel are inappropriate. We do not know what those questions are. They have never been specified. However, it does not seem to me that any warrant procedure would limit the scope of the inquiry once entry was obtained, so that—

Judge Tenney: Why couldn't the questions be asked at the Welfare Center? Is there some mystique?

Miss Soloff: Because they may relate to a definite physical condition in the house or definite condition that is best observed in the home.

Judge Tenney: How did you manage to buy this TV set or buy this or that or something like that?

Miss Soloff: Possibly. I won't refer to the record in the cases, but there are instances where verification was certainly of some moment.

The other thing is that a warrant would justify entry by force, which is the farthest thing from anybody's mind in this case and seems to be the most objectionable thing of all.

Judge Tenney: While it might justify it, would the Welfare Department exercise that privilege?

Miss Soloff: If they have to go and get the warrant, then they have to execute it. Either the client consents

to the entry or the client does not consent to the entry. Of course, it would not solve the other problem—

Judge Tenney: Having obtained a warrant and then not being able to get in other than by force, you might have some reasonable grounds to terminate eligibility.

Miss Soloff: But there is no reason why this should have to be done, why there should be entry by force.

Judge Tenney: There are a lot of things that can be done easily. The trouble is some of them do infringe on constitutional rights. It would be great if we could do a lot of things that we are circumscribed to doing today, but are circumscribed because we have a Constitution.

Miss Soloff: I come back to the right of privacy which is, as the Supreme Court has said, the Fourth Amendment protects people, not places. This plaintiff admits that she to give information. The information about her home is as relevant about the information about herself. That home is protected only because it is her home and not anybody else's.

To the extent that she is under an obligation to provide information under a reasonable inquiry, not whether it is the most desirable way or whether there may be an alternative way. It is a reasonable way.

Judge Feinberg: Miss Soloff, we have been firing a lot of questions to you, so do not be concerned about being limited to the 15 minutes if there is anything else.

Miss Soloff: Thank you, your Honor.

Judge McLean: I have a question which is relevant here. I think you said in your brief that plaintiff had not exhausted her administrative remedies. What remedies?

Miss Soloff: There are now two-step proceedings in the state courts, after Kelly v. Wyman. The prior review conducted by the local agency, as I understand it, and then there is a state fair hearing, which is possible

and which was not requested by this named plaintiff, and our main point was that once having started it, the administrative process, plaintiff should be required to go through it, and there is another reason for that and that is the lack of specificity in the complaint which I have mentioned before, that is, that we do not know what these questions that are being objected to were all about, whereas, a proper record might reveal them.

Judge Tenney: She has a right, conceivably, she is arguing, she has the right to exclude you from her apartment. She has that right under the Constitution. Now, the fact that she likes or does not like the questions that are asked does not seem to me any basis for saying well, if she does not like these particular questions, then maybe we will look into the nature of the questions rather than the nature of the invasion of the privacy.

Miss Soloff: That is what she says is the nature of the invasion of her privacy, is the only complaint she makes. She says they are asking questions I do not want to answer, but I will come down to the Center and answer them.

What I am saying, basically, is she has no more right of privacy in her home than she has in her person.

Judge Tenney: If she is going to answer the questions at the agency, then whether she likes the questions or does not like the questions, what it boils down to is whether she has to answer these particular questions in her home, and you have accordingly a question of whether you have got an unlawful search or an invasion of privacy, if you wish.

Miss Soloff: The invaion of privacy is a conclusion. It results—

Judge Tenney: I am more concerned with the doctrine.

Miss Soloff: —from whether or not what the government has done is reasonable.

The Fourth Amendment prohibits only unreasonable searches and seizures. Here we do not even have a search and seizure, but apart from that it is a question of whether or not it is reasonable. And to do that we have to look, one, at the purpose, whether it is a legitimate purpose; and two, at the way it is conducted, whether it is conducted properly. And the state requirement in this case is hemmed with all kinds of safeguards from the statutes down through the regulations on the state and local level. It is very clear that they want no undue invasion of privacy, but that they do have a right to have certain information available to them.

Judge McLean: You say there is not any search here and, quite true, that nothing has happened yet—

Miss Soloff: That is right.

Judge McLean: —because the plaintiff would not let anybody in, but I suppose we have to consider what would happen if somebody did get in.

Suppose the welfare worker did go in and did look at the television set and did ask her a lot of questions and did see who was living in the apartment and make a little investigation. Would that be a search?

Miss Soloff: Not certainly under traditional standards.

Judge McLean: What is a search, then?

Miss Soloff: A search would be going through the closets, the drawers, all those things that are forbidden.

Judge McLean: So long as you are just looking around in the middle of the room, that is not searching?

Miss Soloff: I think not.

Judge McLean: That is the distinction you draw?

Miss Soloff: It is certainly not the distinction we rely on. What we rely on is the reasonableness of the procedure, whatever you call it. And the reasonableness, as I said, derives, one, from the purpose; and two, from the way in which it is conducted.

Judge Tenney: Supposing she had a still in her apartment, while you might not run to the police, you might figure she had an outside source of income.

Miss Soloff: You might well ask for an explanation, yes, but you would not have to have that information prior to going in.

Judge Feinberg: Is it my understanding that under the present rules and policies that you can require admission even though you do not have permission? In other words, not by force, but by threatening or actually denying benefits?

Miss Soloff: If the home visit is one that is required to establish eligibility or re-eligibility because it is a recertification process. There is—I forget the section of the statute—but because this is not supposed to be a forever kind of assistance, its recertification is required.

Judge Feinberg: Every what, three months, six months?

Miss Soloff: It is six months for recertification, and every three months for certain statutory personal contacts which may or may not be a home visit, depending on the case.

Judge Feinberg: The last question I have is this: Do you have any feel for what would be the practical result of adopting the position that plaintiffs urge, that is, would most people still allow the welfare worker to come in?

Miss Soloff: I have no way of knowing this, no way at all.

I would need two more minutes to address myself to another issue, and that is the temporary restraining order in this case.

We have argued, I think, as fully as we can, our position, first, that the temporary restraining order should be vacated in this case, because when we talk about irreparable injury, we have to talk about the constitutional doctrine that is allegedly being enforced or violated, and

that in this case it is the home visit which can be complied with pending this litigation. So that there is no irreparable injury in the constitutional sense.

In the alternative, we ask that at least it be modified to include only the named plaintiffs, which was originally the request in the order to show cause and which involved only a restoration of this named plaintiff to assistance pending the outcome of this litigation. I think anything else is really in the nature of a preliminary injunction and is premature.

Judge Feinberg: Thank you.

Mr. Bernikow: Your Honors, may I comment briefly on the remarks that have gone before?

Judge Feinberg: I assume you are going to do more than that. I assume you are going to take a position.

Mr. Bernikow: My name is Leonard Bernikow. I am an Assistant Corporation Counsel, and we represent the defendant Jack R. Goldberg, the Commissioner of Social Services of the City of New York.

I would like to just comment briefly on some of the points that were raised, your Honors.

Firstly, I would like to comment on what Miss Soloff said. She alluded to certain benefits, certain purposes, rather, of the home visits, and in addition to all those manifest purposes which she alluded to, it seems to me that an experienced social worker can get a tremendous amount of benefit from a home visit, a certain intangible benefit, if you will, by seeing the individual recipient in the home environment as well as the children. These we cannot put our finger on and say I am doing it for this or that reason, but I really think, as I said before, there is an intangible benefit.

Judge Feinberg: Suppose that is true, that would fall under that suitable surroundings heading?

Mr. Bernikow: Whatever you want to call it, your Honor.

Judge Feinberg: What would be the result of getting that increased information in the field?

Mr. Bernikow: Your Honors, I feel that the welfare worker is not in the shoes of the fire inspector or the housing inspector who is going into the individual house to look for violations. This welfare worker is going there for the ostensible purpose of helping the individual, and whatever that help would amount to, I do not know what it would be, but certainly the experienced social welfare worker would be in a position to know what agencies the individual might be referred to.

Judge Tenney: Maybe the recipient would be very happy to have the case worker come and would recognize the fact that the case worker is interested in helping out, and that it will enable the case worker to function better if the case worker can observe the surroundings, but we are talking about the issue here, not whether all of these visits should be forbidden, absent the warrant. The issue here is with any particular welfare recipient who does not want to receive these benefits that would come from the case worker having observed the conditions of the home and so on. Must that individual surrender his or her rights to receive benefits because she says I do not want the case worker to come, or I will give the information at the Welfare Center but I will not give it in my home?

Mr. Bernikow: I frankly cannot see how a welfare worker can make an adequate assessment of the situation without coming to the home. I feel the substitute of the office visit does not give him the knowledge which he honestly needs to make an evaluation.

Judge McLean: Is there any variation in the amount of these benefits, depending upon circumstances or is it just a flat dollar amount of so much per child?

Mr. Bernikow: I do not know offhand, your Honor. I would imagine that each case is an individual case and there are various benefits that can accrue to the individual recipient, depending upon their circumstances.

Judge McLean: I am visibly ignorant of this. A woman applies for aid to dependent children. She has got two of them, let us say. What is the criteria that determines whether she is going to get that aid or not? Does all she have to do to get it is have two dependent children?

Mr. Bernikow: Need, based on the income which comes into the home certainly would be, I imagine, the first and most important.

Judge McLean: If she is absolutely impoverished, she gets so much per child, doesn't she?

Mr. Bernikow: That is correct.

Judge McLean: Whether she is living in a nice house or a poor house or whether there is a still in the living room or whether there is not; is that right?

Mr. Bernikow: Yes.

Judge McLean: Then what is the purpose of going in to look at it?

Mr. Bernikow: For the benefit of the children. This is aid to dependent children and there are certainly many benefits that can come from an experienced social worker in improving the lot of this individual. Certainly try to get the person to get back on his feet, not to be dependent on welfare, perhaps, but there are certainly many manifest purposes in these home visits.

Judge Tenney: If it does not affect the amount of money that is going to be paid to these children—I think it would be nice for anybody to have people coming to their home and advise them how they might do better, but I do not think that that necessarily gives them the right to come if the person does not want them to come.

Mr. Bernikow: Now your Honor is going to the issue of whether or not this amounts to a search. I frankly do not feel this is a search. Mr. Gilman has raised certain points, in particular saying that—

Judge Tenney: You mean they are blindfolded when they go? It certainly seems to me it is a search.

Mr. Bernikow: They are not blindfolded, your Honor, but Mr. Gilman has made the point that the only way that a person should come in is on a warrant, and the only way to get a warrant is if there is some suspicion of fraud. Certainly, the majority—

Judge Tenney: That is up to the judge or magistrate, whoever it is who passes on it.

Mr. Bernikow: Indeed, it is.

Judge Tenney: Now it just takes out of the hands of the government agency the right to set its own standards for breaching a constitutional guarantee.

Mr. Bernikow: If we carry Mr. Gilman's argument just a little bit further, the Department of Social Services would never get into the home because certainly certain rights are necessary for a warrant—probable cause.

Now, the majority of welfare recipients in this city do not commit fraud and there would never be any probable cause to issue a warrant, and it would have the effect that no welfare worker could ever come into the home.

Judge Feinberg: What would happen if that happened?

Mr. Bernikow: It would defeat the whole purpose of the legislation and regulation.

Judge Feinberg: I know it would defeat the purpose of that portion of the regulations which calls for the home visits, but how would it defeat it? I am really interested. What would be the result if they were not able to get into the home?

Dr. Bernikow: It seems to me that the welfare system would not operate efficiently; the families would go on unaided, there would be over-utilization, poor quality care for children.

Judge Feinberg: What do you mean by "over-utilization"? That is another one of those terms I need some explanation for.

Mr. Bernikow: It seems to me there might be more welfare given than is needed in certain situations.

I think, getting back to my opening remarks, it is where, I am hoping, that it is the experienced welfare worker who goes in and can see what is actually needed in a particular home as well as the amount of funds that are necessary for this particular home. And, as Judge Tenney said, certainly the welfare worker cannot be blinded to anything that is going on, but certainly they are not going in there as policemen. They have given a week's notice to this individual plaintiff that they were coming. Certainly, you do not do that when you want to discover fraud.

So it seems to me that what they are doing is not a search by any means. They are not looking to discover evidence. And I might even suggest that if that were the case, that they did get the evidence of a fraud and criminal proceedings were instituted, then the individual recipient had his remedy at a pretrial motion to suppress.

But my only comment is I do not equate these home visits, which I have tried to put across are not searches, with the unreasonable searches prescribed by the Fourth Amendment.

Thank you very much.

Judge Feinberg: Did you want a few minutes for rebuttal?

Mr. Weiss: Yes, your Honor. Let me just attempt to clarify what seems to be three essential issues which stalks this case. They involve a right, a reason and a rule, I believe, which ties them together.

The right of the right, which is the Fourth Amendment, stakes out only partially, and that is the right of the sanctity of your own home. The right which has been mentioned in other decisions and in a more peripheral context, the right to privacy. This is the right that we seek to have protected here.

The injunction we seek is to prevent all damages to that right, damages either by forfeiture of that right, a forfeiture which is forbidden under cases such as Spevak v. Klein and Garrity v. New Jersey, or the punishment to exercise that right of denying benefits as in the case of the named plaintiff.

What we seek to enjoin are all practices which inhibit, invade or punish for the assertion of the right to be secure in the home, the right which has been staked out under the decisions of the Fourth Amendment and other ones.

The government seeks to justify invasions, sanctions and so on, of its right by purported statutory reasons. But these reasons—

Judge Feinberg: They do more than that. They say it is for the benefit of the welfare recipient. I do not think you can take that lightly.

Mr. Weiss: I think what they offer is not what the Welfare Department does in fact offer. If we are interested in the welfare of the child, there are appropriate government agencies. All people have the right, just as welfare clients are claimed to have here, to the wonderful visit of a social worker. All parents have the same right to sanctity of home from invasions by government agencies, but when those government agencies, such as the Bureau of Child Welfare, Society for the Prevention of Cruelty to Children, and such organizations want to go there, into a home, they follow the laws of the state.

There is the Family Court Act here, neglect proceedings, to look into the suitability of surroundings which applies to all, welfare recipients and non-welfare recipients alike. Just because the family one day has need also of funds should not open them up to the types of inquiries that others do not have, or if you want the types of punitive benefits of the visits of social workers. All families in this country fall under the purview of statutes which deal with parental rights, the rights of children to be secure

from abuse and neglect. Welfare recipients are no different.

The same applies to arguments about building violations. It appears the figures are roughly that 75 percent of welfare recipients here in New York live in buildings defined by the Building Department as defective. Other people who live in those buildings are not welfare recipients. All have the same rights to be free from people coming into their homes, all have the same rights not if in fact they want to be invited in. Welfare recipients are no different in view of these legitimate state purposes which are appropriate for other agencies than the Welfare Department.

If there is reason to believe that they are not suitable surroundings for infants, any infants, be it on welfare or not, should immediately be taken care of by somebody going into Family Court, filing a neglect petition, and having a proper investigation. There would be no mutual assumption that somehow people on welfare should be open to some sort of inquiry which may or may not result in the neglect petition.

Which brings me to the third point. The rule that generally governs legitimate government objectives in the sanctity of the home is, after all, the warrant. Normally, the justification for invading a home is danger to public safety. This is what is at stake in your traditional search cases. You have no such danger to public safety, though, by the way, you do have the possibility of criminal referral.

The case of the still, it seems to me fairly clear under the welfare provisions of notification of law enforcement officers to any criminal evidence turned up, would have to be referred to appropriate criminal authorities raising considerable questions as to whether or not this is not a criminal search.

In any event, all they can be talking about in coming into the home is not traditional public safety, but, in fact,

suitable home or buildings which are appropriate investigative things for other agencies, or perhaps the amount of money, which can be done by forms or, in the case of fraud, by investigations.

In a case such as Colonnade, where you have a specific licensing request for permission and specifically go into a locale to find specific material objects, you have, of course, another exception which is in the root of a regulatory system, which—

Judge Tenney: In the home?

Mr. Weiss: It was a commercial establishment pursuant to a liquor license where, in fact, the danger was specifically stated that sophisticated people may destroy the evidence. The welfare visit, which they claim quite often notice is given a week ahead, no such rationale exists.

A warrant should issue when there is probable cause, that is, sufficient evidence of a specific item which a judge can take normal notice of to justify whatever agency is pursuing its statutory objectives by going into the home. You have a right to a warrant, for example, obviously, in a criminal case where you have a specific item of evidence that will lead you to believe something about a crime so you can go in and do that.

Judge McLean: You would not allow the issuance of a warrant just to enable the Welfare Department to carry out its own ideas of how welfare should be administered; is that right?

Mr. Weiss: If I undertand the question, yes. I think insofar as they want a warrant just to go in for their own administrative convenience, clearly not.

Judge McLean: They have a theory that it does some good to see what kind of a home these children are living in. Now, that is not enough to issue a warrant?

Mr. Weiss: No, I do not think it is.

Judge McLean: They would have to show some cause to believe there was a crime being committed?

Mr. Weiss: Not necesarily a crime. That there might be the final judicial limits. What the limit is, they must show something wrong is going on, and if they are the appropriate agency in a neglect situation, it might be possible; if you have reason to believe, for example, a father were beating to death a child and assuming you did not have access to a criminal warrant because that is a crime.

Judge McLean: How are they going to find out unless they go in?

Mr. Weiss: It is the same issue you have with every family. Every family in the country may be in fact doing things bad for the children.

Perhaps I myself, your Honor, could have used a social worker as a child. My parents are free from that intrusion, they are not on welfare.

If the New York State had passed a law saying every single family in New York must have a home visit twice a year to see if the parents are doing a good job, that would clearly be unconstitutional. So, too, it is unconstitutional.

The only differentiating mark is people going on welfare pushed as they are by economic necessity. There is really no distinction.

They cannot find out in the case of a normal citizen, who perhaps they would if they could, and should not be able to in the case of a welfare citizen.

I suggest that there are agencies who do find many ways to find out if something is going on. There are many neglect petitions filed in the State of New York against welfare recipients and non-welfare recipients. That is the appropriate agency for inquiring into whether or not something is going on in the home. In fact, if somebody goes on welfare there is no reason to open themselves up to more scrutiny, more invasion of privacy in this lawless, warrantless way.

Judge Feinberg: Thank you. We will take the matter under advisement.

Memorandum Re NOLEO Provisions.

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July 2, 1969

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Project Director

PAUL DODYK
Faculty Director

The Honorable Wilfred J. Feinberg
Circuit Judge
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York

The Honorable Charles Tenney
District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York

The Honorable Edward C. McLean
District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Re: James v. Goldberg
69 Civ. 2448

Honorable Sirs:

In response to Judge Tenney's request for information concerning the NOLEO provisions and the fraud provisions

as they operate in the context of home visits in New York, we enclose the attached memorandum.

Sincerely,

Nancy Duff Levy
David Gilman
Jonathan Weiss
Lee A. Albert
Henry A. Freedman
Nancy Duff Levy

Counsel for Plaintiff

cc: Brenda Soloff
Assistant Attorney General
Leonard Bernikow
Assistant Corporation Counsel

Memorandum Re NOLEO Provisions.

The Fraud Provisions

Section 145 of the Social Welfare Law provides that:

> Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of a person receiving public assistance or care to notify the public welfare official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall, upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he *shall* refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official. (emphasis added)

As the court held in *People* v. *LaFace,* 148 Misc. 238, 266 N.Y.S., 458, the essence of the crime under this section in the *false representation of eligibility* for public assistance, and it makes no difference whether the assistance is obtained or could be obtained.

The regulations of the Department of Social Services further implement this statutory provision by specifying particular measures to be taken designed to prevent and detect fraud. See 18 NYCRR 348. While there is no explicit statement that misrepresentations about eligibility will result in criminal prosecution for fraud, the breadth of the fraud statute and its interpretation in the *LaFace* case, *supra,* indicate that such misrepresentations are clearly within the statute. Further, Department regulations place upon the applicant or recipient of public assistance the affirmative continuing responsibility of providing accurate, complete and current information on his needs and resources, of applying for and utilizing any benefits or resources that will reduce or eliminate [illegible] for public assistance, and of notifying the local agency of any changes in his needs and resources. 18 NYCRR 351.1. This continuing responsibility, coupled with Section 145 and the general provisions of the Penal Law relating to larceny and misrepresentation, Penal Law §§ 155 *et seq.*, 170 *et seq.*, 175 *et seq.*, operate to require that misrepresentations about eligibility be referred by the Department to the appropriate district attorney or other prosecuting official.*

As discussed in Plaintiffs' main brief, evidence leading to a criminal fraud prosecution may, of course, be obtained by a home visit. Thus, although Defendants argue that actual fraud investigations are only one purpose of the home visit, clearly any misrepresentation of eligibility made by the recipient and revealed to the caseworker during the home visit would also constitute welfare fraud which must be referred to law enforcement officials.

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* In 1968, for example, solely on the basis of alleged undisclosed assets of over $500, 247 cases were referred by the Resources Division of the Department of Social Services to New York City prosecution. Allegations of fraud in other cases (*e.g.*, larceny, forgery) resulted in 127 referrals to prosecution in that same year.

Memorandum Re NOLEO Provisions.

The NOLEO Provisions

The NOLEO (Notice to Law Enforcement Officials) provisions of the Social Security Act provide for the detection of parents suspected of child neglect and for the apprehension of deserting and abandoning parents.

Thus, title 42, U.S.C. 602(a)(16), (17), (18), requires that a state plan for aid and services to needy families with children must provide that:

> [16] where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect; abuse or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have; [17] provide
>
> (A) for the development and implementation of a program under which the State agency will undertake—
>
> (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him and
>
> (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

[18] *provide for entering into cooperative arrangements with appropriate courts and law enforcement officials* (A) to assist the State agency in administering the program referred to in clause [17] (A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) *with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan.*" (emphasis added)

The significant part of the language is as follows: the requirement of a single organizational unit in the state agency or local agency which will be responsible for the administration of the Notice to Law Enforcement Officials program; the requirement that where the state agency has reason to believe that the home in which the child is residing is unsuitable because of neglect, abuse, or exploitation of such child, the agency shall bring such condition to the attention of the appropriate court or law enforcement agencies; the encouragement to states to enter into reciprocal arrangements to obtain or enforce orders for support; the encouragement to the state agency to establish an informational relationship with law enforcement officials and family courts for matters of common concern to the respective agencies.*

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* For New York regulations implementing these provisions see 18 NYCRR 347.

Thus, any information gathered by the caseworker during a home visit with respect to any situation which might lead to an action for child neglect or child support is required to be referred to the prosecutive agencies of the state. The caseworker, who has a confidential relationship with the recipient, and who maintains supposedly confidential files on the recipient, is nonetheless charged with the legal obligation to report information which may be adverse to either or both parents to the proper authorities.*

Of course, welfare administration has historically been enshrouded with law enforcement activity, Bell, *Aid to Dependent Children* (1965), and New York is no exception, *e.g., Peo.* v. *Pickett,* 19 NY2d 170 (1967). What the NOLEO provisions accomplished at the time of their enactment in the late 1940's was the transfer of the element of discretion from welfare to law enforcement officials. This transfer thus makes the welfare agency an intimate part of the process of coercion and compulsion in apprehending deserting or abandoning parents, and the welfare agency is, theoretically, at least, denied any discretion in the matter.

Other provisions of the Social Security Act dealing with NOLEO require that the state welfare agency report to the Secretary of Health, Education and Welfare "at such time and in such manner" as the Secretary may prescribe:

> (A) The name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan—

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* While these provisions do not explicitly impose an obligation to furnish information on the recipient or applicant of public assistance, their obvious self-incrimination potential should also be noted, and, in fact is now being challenged in the Connecticut case of *Doe* v. *Shapiro,* Civ. No. 13093 (D. C. Conn. 1969) (TRO granted April 28, 1969).

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare . . .

(B) the last known address of such parent and any information it has with respect to the date on which such parent could last be located at such address, . . . 42 U.S.C. 602(a)(21).

The Secretary of Health, Education, and Welfare is then charged with the responsibility of furnishing to the Secretary of the Treasury, or rather, more accurately, the Department of Internal Revenue, the names and social security account numbers of such parents. The IRS must then endeavor to ascertain the address of each such parent from the files of the Internal Revenue Service, and so furnish the address to the state agency which submitted the report. 42 U.S.C. 610. These provisions, hence, bring in federal agencies, HEW and the Internal Revenue Service, in locating the whereabouts of an abandoning or deserting parent.

From the above, it is obvious that the public assistance laws are surrounded with the likelihood of criminal prosecution. Such prosecutions can take a variety of forms, including welfare fraud, adultery, criminal neglect of children, and also child neglect proceedings in which a parent loses custody of the child. While the latter is not strictly a

criminal proceeding, it certainly is quasi-punitive, involving the forfeiture of one's own child. *Cf. Armstrong* v. *Manzo,* 280 U. S. 545 (1965).

It is equally clear that information which must be referred to law enforcement officials may be obtained during a home visit. Thus, to the client, the home visit is tinged not only with the threat of a cut-off of funds necessary to the existence of life itself, but it is also tainted with the threat of penal sanctions against the recipient and the abandoning or deserting parent, and tinged with the threat of removal of the children from the home.

The required enforcement of the federal NOLEO provisions can thus lead to the criminal prosecution of the recipient and/or members of her family as readily as can the discovery of fraud by the welfare agency. Just as prosecution for welfare fraud may result from evidence obtained during a home visit, so may prosecution for child neglect or child support result from such a visit.

Reply Memorandum of Law in Behalf of Defendant Wyman.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

This memorandum is submited in reply to plaintiffs' contention that because certain statutes provide for prosecution for welfare fraud, all welfare investigations must be conducted within the ambit of criminal law standards.

The belated injection by plaintiffs of this issue into this case, an issue not even suggested by the complaint, is wholly without merit and is completely irrelevant to the issues in the case at bar. The only purpose of the home visit is to determine eligibility and continuing eligibilty for public assistance. There is nothing in the record in this case to support an inference that its purpose is to obtain information of criminal fraud. The home visit is merely to obtain information not available by an office visit during which further information is also requested which can, under plaintiffs' analysis suffer from the same defect as the home visit. In fact neither the office visit nor the home visit is conducted with the view toward prosecution for fraud. The number of fraud convictions in welfare cases, considering the number of people receiving public assistance is minimal indeed. In 1966 the total number of convictions obtained by the Department of Social Services and by the district attorneys of the counties of the City of New York in misdemeanor and felony cases was 84; in 1967 the total number was 50 and in 1968 the total number was

22.* Many convictions under the Welfare Law are not even convictions of recipients of public assistance, but involve such things as stolen and forged welfare checks. Moreover, there is no indication that any of these convictions stemmed from anything learned at a home visit. Typically, convictions result from failure to disclose other sources of income such as social security or workmen's compensation benefits or failure to disclose employment.

The idea that information which might prove damaging might be obtained in the course of legitimate investigation during which certain information is required to be supplied, is not a reason to require criminal standards to govern the investigation. The Supreme Court has, indeed, rejected the notion that eligibility for some sort of public benefit may not be removed by a failure to disclose relevant information with a proviso that information so obtained is not to be used in a criminal prosecution. *Gardner* v. *Broderick*, 392 U. S. 273 (1968). Thus, if information were obtained from a home visit and that information were used to form a basis for a criminal prosecution, it might be open to plaintiff to move to suppress any evidence so obtained. As the Court said in *Hill* v. *United States*, 346 F. 2d 175 (9th Cir.), *cert. denied* 382 U. S. 956 (1965):

> "If a criminal prosecution does subsequently take place, appellant can raise by a motion to suppress any evidence which the government may have secured in vioation of his constitutional rights."

Thus, if it were determined that evidence obtained by virtue of a home visit was not to be the subject of a criminal

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* This information has been supplied by the legal division of the New York City Department of Social Services.

prosecution, the criminal prosecution would be the place to raise the issue. The possibility of such prosecution which is merely remote and speculative does not excuse the obligation to provide necessary information.

The fact that strict standards of probable cause do not govern all administrative inquiries is amply demonstrated not only in the cases cited in our main memorandum of law, but also for example in *United States* v. *DeGrosa*, 405 F. 2d 926, 928 (3d Cir. 1969) involving an internal revenue summons and *United States* v. *Glaziou*, 402 F. 2d 8 (2d Cir. 1968) involving customs inspections. Any routine inquiry required to be made to verify information may lead to consequences not foreseen at the time of the inquiry and which are not the purpose of the conduct of the inquiry. As simple a situation as the offer of a check to a bank teller might lead to a prosecution if the signature cannot be verified and proves to be forged. However, it is not the purpose of the verification to prosecute for fraud but merely to protect the funds of the bank. In the instant cases, we have said it is not the purpose of the home visit to obtain evidence for prosecution. There are an infinitestimal number of convictions for welfare fraud, and any objection to evidence can be made at the time it is offered. The attempt to bring all administrative proceedings within the criminal process is wholly unwarranted, and would prove intolerable to the sound administration of such agencies. The obligation of the State to the children it supports by virtue of the Aid to Dependent Children Program would not support awaiting evidence of criminal abuse. In this respect, it is to be noted that the oral argument made on behalf of plaintiffs that children under this program should be treated no differently from children not receiving such aid wholly overlooks the special nature of the obligation of the State toward the children it has specifically undertaken to support in their homes.

CONCLUSION

The complaint should be dismissed.

Dated: New York, New York, July 11, 1969

Respectfully submitted,

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State of New York
Attorney for Defendant Wyman

SAMUEL A. HIRSHOWITZ
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Assistant Attorney General
of Counsel

Opinion of Three Judge-Court.

TENNEY, District Judge:

Plaintiff individually and on behalf of her minor child and all other persons similarly situated, seeks injunctive and declaratory relief pursuant to Rule 57 of the Federal Rules of Civil Procedure and Section 1983, United States Code, Title 42, to secure rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States, and Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, 1381 *et seq.* and the regulations promulgated thereunder. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343(3)(4), which provides for the original jurisdiction of district courts in suits authorized by 42 U.S.C. § 1983, and by 28 U.S.C. §§ 1331, 2201, 2202.

This suit, commenced by order to show cause on June 6, 1969, seeks to prevent the termination of Aid to Families with Dependent Children (hereinafter referred to as "AFDC") benefits for failure to consent to the entry into plaintiff's home of officials of the Department of Social Services (hereinafter referred to as "the Department") upon the grounds that such termination constitutes a violation of both plaintiff's right to be secure in her home from unreasonable searches thereof and of her right to privacy. By order dated June 13, 1969, the District Court Judge, after memoranda and affidavits had been submitted and oral argument had thereon: (1) ordered, pursuant to 28 U.S.C. §§ 2281, 2284, the convocation of a statutory three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein; (2) found that the action may properly proceed as a class action puruant to Fed. R. Civ. P. 23; and (3) granted, pursuant to 28 U.S.C. § 2284(3), a temporary

restraining order protecting plaintiff and the "class" she represents from the denial or termination of AFDC benefits based solely upon their refusal to consent to the entry of officials of the Department into their homes, pending the determination by the full court of plaintiff's application.

Thereafter, additional memoranda and affidavits were submitted, and, on June 30, 1969, oral argument was had before the three-judge court.

The facts underlying the issues presented reveal that plaintiff, a resident of the City and State of New York, Bronx County, has been a recipient of AFDC benefits for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit her at home on May 14, 1969. Plaintiff replied that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumtances could the caseworker make a home visit. The caseworker explained that Department regulations require that she visit plaintiff in her home to discuss the recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her AFDC benefits. While reiterating her willingness to provide whatever information was requested at the offices of the Department, plaintiff continued to deny the caseworker entry into her home.

On May 13, 1969, the Department sent plaintiff a notice of intent to discontinue her AFDC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the offices of the Department. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance, to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

In opposition to plaintiff's application for a permanent injunction restraining and enjoining the enforcement of these City and State Departments of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States, defendants argue that: (1) the home visit is neither a search nor a seizure, but is merely designed to verify information as to eligibility for public assistance and is thus reasonably related to a valid governmental policy;[3] (2) the home visit is designed to make available to the recipient of AFDC benefits professional counseling so that the recipient can best utilize his limited resources;[4] (3) since the receipt of public assitance is a privilege, citing *King* v. *Smith*, 392 U. S. 309 (1968), plaintiff is obligated to provide necessary information so that this privilege can be recognized and implemented;[5] and (4) in contradictory statements, "[t]here may be fraud . . . which should come to the attention of the administrative agency and which would not without home visits,"[6] and "[i]t is not the purpose of

home visits to look for evidence of fraud or other criminal activity and there is no suggestion that entry is sought for these purposes.'"

The issue presented for determination by this statutory court, simply put, is whether the Department of Social Services can deny, reduce or terminate AFDC benefits to otherwise eligible persons who refuse to allow caseworkers to enter their homes without a warrant, issued upon probable cause. For the reasons which follow, we find that the Department may not.

The Fourth Amendment to the Constitution explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The overriding function and basic purpose of this Amendment is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials. *Camara* v. *Municipal Court of the City & County of San Francisco,* 387 U. S. 523, 528 (1967); *Schmerber* v. *California,* 384 U. S. 757, 767 (1966); *United States* v. *Mancusi,* 379 F. 2d 897, 903 (2d Cir. 1967), *aff'd,* 392 U. S. 364 (1968). The Amendment gives concrete expression to a right of the people which "is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). As such, this right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Stanford* v. *Texas,* 379 U. S. 476, 481 (1965); *Ker* v. *California,* 374 U. S. 23, 30 (1963); *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961).

Except in certain carefully defined classes of cases,[8] a search of a private dwelling without a warrant or proper consent is presumptively "unreasonable". *Katz* v. *United States,* 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 528-29; *Frank* v. *Maryland,* 359 U. S. 360, 380 (1959)

(Douglas, J., dissenting); *Agnello* v. *United States,* 269 U. S. 20, 32 (1925). Therefore, the following issues present themseves for determination: (a) are the home visits required by the Department of Social Services in connection with the initial and continuing finding of eligibility "searches" within the meaning of the Fourth Amendment; (b) was the Fourth Amendment designed to protect plaintiff and the "class" she represents; and (c) assuming that (a) and (b) are answered in the affirmative, may the State condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the Fourth Amendment?

Upon oral argument, the Attorney General urged that home visits could not be considered a "search" within the meaning of the Fourth Amendment in that caseworkers are instructed not to enter the home of an applicant for or recipient of benefits "without permission by force, or under false pretenses, and not to make a search of the home by looking into closets and drawers.'" The Fourth Amendment, however, governs all intrusions by agents of the public upon personal privacy and security. *Terry* v. *Ohio,* 392 U. S. 1, 18 n. 15 (1968). Any unauthorized physical penetration into the premises occupied by plaintiff is a search. In view of the fact that recent cases have expanded the scope of the Amendment so as to eliminate the necessity for a finding of an actual physical trespass upon a constitutionally protected area, *Berger* v. *New York,* 388 U. S. 41, 50-53 (1967) and the cases cited therein, defendant's restrictive argument would appear frivolous. The zone of privacy created by the Amendment encompasses the "sanctity of a man's home and the privacies of life" and therefore must consist of something more than his closets and drawers. *Boyd* v. *United States,* 116 U. S. 616, 630 (1886); see also *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965).

The Court in *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 530, found that while a routine inspection of the physical condition of private property was a less hostile intrusion that the typical policeman's search for the fruits and instrumentalities of crime, nevertheless the community interest in municipal fire, health and housing inspection programs was not superior to the important interests safeguarded by the Fourth Amendment's protection against official intrusion. We find this dispositive of the first issue presented and, accordingly, home visits must be considered "searches" within the meaning of the Fourth Amendment.

The guarantee of protection against unreasonable searches extends to the innocent and guilty alike. *McDonald* v. *United States,* 335 U. S. 451, 453 (1948); see also *Hoffa* v. *United States,* 385 U. S. 293 (1966), *rehearing denied,* 386 U. S. 940, 951 (1967); *Lewis* v. *United States,* 385 U. S. 206 (1966), *rehearing denied,* 386 U. S. 939 (1967). Like most of the Bill of Rights, the Fourth Amendment was not designed to be a shelter for criminals, but a basic protection for everyone. It reaches all, whether accused of crime or not. *Abel* v. *United States,* 362 U. S. 217, 254-56 (1960) (Brennan, J., dissenting); *Weeks* v. *United States,* 232 U. S. 383, 392 (1914). Since the most effective preventive against unlawful searches is the exclusion of their fruits from criminal evidence, this right must be upheld when asserted by those who transgress the law. But it cannot be inferred from this that the central thrust of the guarantee is to protect against a search for such evidence. "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers." *Abel* v. *United States, supra* at 255. As Judge Prettyman argued in *District of Columbia* v. *Little,* 178 F. 2d 13, 16-17 (D. C. Cir. 1949), *aff'd on other grounds,* 339 U. S. 1 (1950):

> "[T]he common-law right of a man to privacy in his home . . . is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of crime has a right to protection against [the] search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

Judge Prettyman added that the Fourth Amendment applied to health inspectors as well as to police officers—indeed to every and any official of government seeking admission to any home.

> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."

Judge Prettyman's argument was first accepted by Mr. Justice Douglas in his dissent to the Opinion of the Court in *Frank* v. *Maryland, supra* at 377-78. Subsequently, *Frank* was overruled by *Camara,* wherein the Court approved Judge Prettyman's holding by finding that "[i]t

is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. . . . [E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . .'"[10]

Therefore, governmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity. *Abel* v. *United States, supra* at 254-56; *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 408 (S. D. Iowa 1968). To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely "social problem". See *Verdugo* v. *United States,* 402 F. 2d 599, 611 n. 20 (9th Cir. 1968). Accordingly, plaintiff and the "class" she represents must be afforded the guarantees of the Fourth Amendment.

Even if we assume that AFDC grants are a privilege or governmental gratuity,[11] the power of government to decline to extend these benefits to its citizens "does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." *Parrish* v. *Civil Service Comm'n of the County of Alameda,* 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623, 630 (1967). For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right. *Thompson* v. *Shapiro,* 270 F. Supp.

331, 336 (D. Conn. 1967), *aff'd*, —— U. S. ——, 37 U.S.L.W. 4333 (1969). While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welware § 9 n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor. No showing merely of a raional relationship to some valid governmental policy will suffice. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Weiman* v. *Updegraff*, 344 U. S. 183, 191-92 (1952); *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 390 (1950); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). Nor will it suffice for the state to show merely that the public interest justifies the type of search in question. For the issue is not whether the public interest justifies home visits, but whether the initial or continued receipt of ADFC benefits can in consonance with the Constitution be made dependent upon the applicants' or recipients' submission to *warrantless* searches.[12]

The public interest may demand creation of a general exception to the Fourth Amendment's warrant requirement only when it can be demonstrated "that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit." *Parrish* v. *Civil Service Comm'n of the County of Alameda*, *supra*. Permissive legislative goals may not be pursued

by means that significantly inhibit fundamental personal liberties when the end can be more narrowly achieved. *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). This Court cannot with deference to the Fourth Amendment excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative. *Terry* v. *Ohio, supra; Berger* v. *New York, supra* at 114 (White J., dissenting); *McDonald* v. *United State, supra* at 456; see also *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967). No such showing has been made herein.[13]

Less drastic means may be suggested for achieving the same basic purposes for which the City and State urge home visits are designed. Proof of actual residence may be ascertained, for example, by the submission of a duly-executed leave upon the premises in question. Family composition may be verified by the submission, in this instance, of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers. This is especially true since there is no assurance that the child will even be present when the home visit is made. Information regarding goods or services which the recipient may need in the management of her home can equally be obtained in the offices of the Department should the recipient wish to make her needs known there rather than in the convenience of her home. The regularity of school attendance, academic achievement and information gathered from interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home.

Should any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search

of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of "probable cause", will test the particular decision to search against the constitutional mandate of reasonableness. Should this official determine that a valid public interest justifies the intrusion contemplated, then there exists probable cause to issue a suitably restricted search warrant. In this respect it must be noted that the Court in *Camara* v. *Municipal Court of the City of County of San Francisco, supra* at 539, emphasized that "a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime." This would appear applicable to the instant proceedings.

As previously indicated, the Attorney General has suggested that it is not the purpose of the home visit to look for evidence of criminal activity. This Court, however, must take notice of Section 145 of the Social Welfare Law, which provides that:

> "Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of the person receiving public assistance or care to notify the public welfare official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall,

upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official.*" (Emphasis added.)

The Court in *People* v. *La Face*, 148 Misc. 238, 266 N.Y.S. 458 (Westchester County Ct. 1933) found that "the crime as defined under section 148 of the Public Welfare Law," a section substantially identical to Section 145 of the present Social Welfare Law,[14] "is not the consummation of fraud upon a particular department. The essence of the crime is the false representation in an application for relief. It makes no difference whether the relief is obtained or could have been obtained." The breadth of the interpretation given the fraud statute in *La Face*, coupled with the fact that this Court must assume that caseworkers will comply with the provisions of Section 145 by referring facts or evidence of welfare fraud gathered by them in the course of home visits to the appropriate prosecuting official, sustains the view that home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity.[15] As such, they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given.

Defendants argue further that plaintiffs must first exhaust available administrative remedies prior to seeking a federal forum. However, one of the purposes of the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343, is "to provide a remedy in the federal courts supplementary to any remedy any State might have." *McNeese* v. *Board of*

Educ., 373 U. S. 668, 672 (1963). Relief under the Civil Rights Act may not, therefore, be defeated for failure to exhaust available state administrative remedies. *Damico* v. *California*, 389 U. S. 416, 417 (1967); *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

The Court of Appeals for the Second Circuit in the recent decision in *The Colonnade Catering Corp.* v. *United States*, Docket No. 32817 (2d Cir., filed March 26, 1969) upheld a warrantless search by Internal Revenue Service agents of a catering establishment which held a New York State liquor license. In reversing the district court's order suppressing certain evidence seized, the Court of Appeals went to great lengths to distinguish *Camara* and *See* v. *City of Seattle*, 387 U. S. 541 (1967). The Court found that in contrast to the broad delegation of inspection power authorized in *Camara* and *See*, the statutory grants of inspection power under review were carefully defined and narrowed so that they granted "little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review." We find no such limitations upon the power of caseworkers to enter and search the homes of applicants for or recipients of public assistance. It is not sufficient that caseworkers are instructed not to enter by force or under false pretenses and not to look in closets and drawers.

Further, the Court of Appeals noted that "[d]ealers in liquor, *unlike homeowners* or businessmen conducting less specialized activities, are engaged in a heavily regulated business," (emphasis added) and, therefore, as "sophisticated licensees . . . are undoubtedly acquainted with the limits upon the agent's inspection rights." No such presumptions may properly be made herein. Defendant's reliance on *Colonnade* is, therefore, misplaced.

Accordingly, we find that the City and State may not condition the initial and continuing receipt of AFDC bene-

fits upon a waiver of rights embodied in the Fourth Amendment. A contrary holding would threaten to "produce a result which the State could not command directly." *Speiser* v. *Randall, supra* at 526.

Doubtless there exists a pressing State interest in preventing such anti-social behavior as child abuse or neglect. But we see no reason why, in this respect, all families should not be treated alike. Specified procedures now exist under which the State can intervene in such circumstances to determine whether a child is neglected and, should such a finding be made, to regulate the neglected child's home or, if necessary, remove him from his home to insure that his needs are properly cared for.[10]

It is hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their "clients". However, when entry is barred, benefits may not be denied or terminated solely on this basis.

This Court recognizes the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved. Such efforts, however, must be, and clearly can be, conducted with due regard for the constitutional rights of welfare recipients. The laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure.

The oft-quoted protest of William Pitt would appear particularly, if not ironically, sound:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of

England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Plaintiffs' motion for a permanent injunction is granted. Submit order, on notice, in conformity herewith.

Dated: New York, New York, August 18, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J.

FOOTNOTES

[1] "The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits* and Contacts. Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

[3] Memorandum of Law in Behalf of Dependant Wyman, dated June 26, 1969 at 5.

[4] *Id.* at 17.

[5] *Id.* at 26.

[6] *Supra* note 4.

[7] Memorandum of Law in Behalf of Defendant Wyman, *supra* note 3 at 31-32. By his affidavit of June 26, 1969, Leonard Bernikow, Assistant Corporation Counsel representing defendant Jack R. Goldberg, relies upon the brief submitted by the Attorney General for defendant George K. Wyman.

[8] As Mr. Justice Douglas noted in his dissent in *Frank* v. *Maryland,* 359 U. S. 360, 380 (1959):

> "We have emphasized over and over again that a search without a warrant can be made only in exceptional circumstances. If a house is on fire or if the police see a fugitive enter a building, entry without a search warrant can of course be made."

Additionally, under recently restricted circumstances, a warrantless search may be made as incident to a lawful arrest. *Chimel* v. *California,* —— U. S. ——, 37 U.S.L.W. 4613 (1969).

[9] Letter from Jack R. Goldberg to Lee A. Albert, April 11, 1969. Appendix A of Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary and Permanent Injunction.

[10] *Camara* v. *Municipal Court of the City & County of San Francisco*, 387 U. S. 523, 530-31 (1967).

[11] Recent scholarship has urged that the distinction between "rights" which are said to be vested and "privileges" which are said to be a mere government gratuity, be abolished. French, Comment: Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234, 236-39 (1961). Professor Charles Reich's theory of "entitlement" suggests that welfare benefits are no longer gratuities but have assumed at least some of the characteristics of "rights". Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245 (1965); Reich, The New Property, 73 Yale L. J. 733 (1964). See O'Neill, Unconstitutional Conditions: Welfare Benefits With Strings Attached, 54 Calif. L. Rev. 443 (1966).

[12] An analogy may be drawn between the listing of dependents on an income tax return and the listing of dependent children on applications for public assistance. Yet, could it be successfully argued that the right to obtain an income tax exemption for such dependents may lawfully be made dependent upon the taxpayer's consent to the warrantless entry into his home of Internal Revenue Service Agents?

[13] In this respect it should be noted that the Department of Health, Education and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." Dept. of HEW, Determination of Eligibility for Public Assistance Programs, 33 Fed. Reg. 17189 (1968).

[14] Section 148 of the Public Welfare Law provided:

> "Any fraud or false representation made by an applicant for relief, or by any person to secure relief for another person, or any wilful act designed to interfere with the proper administration of public relief and care, shall be deemed a misdemeanor."

[15] See also, in this context, 42 U.S.C. § 602(a)(16), (17), (18); N. Y. Penal Law §§ 155 *et seq.*; 18 NYCRR 347, 348, 351.1.

[16] Family Court Act Art. 3. (McKinney 1963).

McLEAN, D. J., dissenting

I am unable to agree with the court's conclusion in this case. We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law. To my mind it is unrealistic to regard this visit as a "search," and even more so to hold it to be an unreasonable search.

The court's opinion does not make clear what showing is to be made to obtain the warrant which the court considers necessary. If a warrant can issue only upon a showing of probable cause that the law has been violated, then the fundamental purpose of the program is ignored. Aid to dependent children becomes in effect another criminal statute. If, on the other hand, the welfare worker can obtain a warrant merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality. The need is evident. A welfare worker's time should not be wasted in elaborating the obvious. Reading leases (if in fact there are any), birth certificates, school records and the like, cannot be an adequate substitute for first-hand observation of living conditions in the home. What the warrant will do, in my opinion, is to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust.

Camara and *See* involved true searches. Those cases are distinguishable on their facts from this one. They do not

require the result which the court has reached here. The court has extended the doctrine of those cases in order to reach this result, thereby striking a damaging blow to the successful administration of this important social welfare program.

I would deny the motion and dismiss the action.

Dated: August 18, 1969

EDWARD C. McLEAN,
U.S.D.J.

ORDER FOR PERMANENT INJUNCTION

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2281, for a permanent injunction enjoining defendants Wyman and Goldberg from denying, reducing or terminating public assistance to plaintiff and the class she represents, solely on the grounds of her refusal to consent to the entry into her home of welfare officials without a valid Search Warrant and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, it is

ORDERED, ADJUDGED AND DECREED that Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance, and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations are invalid and unconstitutional in so far as they authorize or require state and local officials to deny, reduce, or terminate Aid to Families with Dependent Children benefits on the ground that the applicant therefor or the recipient thereof refuses

to consent to home visits by welfare officials; and it is further

ORDERED, ADJUDGED AND DECREED that defendants, their successors in office, agents and employees and all persons in active concert or participation with them, are hereby enjoined from depriving otherwise eligible persons of Aid to Families with Dependent Children benefits by reason of their refusal to freely consent to the entry of welfare officials into their dwelling places without a valid Search Warrant.

Dated: New York, New York, October 1, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J

I DISSENT:

EDWARD C. McLEAN
U.S.D.J

Defendant Wyman's Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

Notice is hereby given that GEORGE K. WYMAN, defendant above named, hereby appeals to the Supreme Court of the United States from the final order, judgment and decree granting the plaintiffs' application for declaratory relief ordering, adjudging and decreeing that Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance, and Sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations are invalid and unconstitutional insofar as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits on the ground that the applicant or recipient refuses to consent to home visits by welfare officials and further granting plaintiffs motion for a permanent injunction enjoining the defendants from refusing or terminating such benefits to persons who refuse freely to consent to the entry of welfare officials into their dwelling places without a valid search warrant.

The final order was entered on October 1, 1969.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, New York, October 23, 1969.

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Attention: Mr. Bernikow.

Defendant Goldberg's Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York hereby appeals to the Supreme Court of the United States from the final order, judgment and decree granting the plaintiffs' application for declaratory relief ordering, adjudging and decreeing that Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Service Assistance, and Sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations are invalid and unconstitutional insofar as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits on the ground that the applicant or recipient refuses to consent to home visits by welfare officials and further granting plaintiffs motion for a permanent injunction enjoining the defendants from refusing or terminating such benefits to persons who refuse freely to consent to the entry of welfare officials into their dwelling places without a valid search warrant.

The final order was entered on October 1, 1969.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, November 25, 1969.

Yours etc.,

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Office-Supreme Court, U.S.
FILED
DEC 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~977~~ 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANT WYMAN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANT WYMAN

Appellant, George K. Wyman, appeals from a judgment and order of the United States District Court for the Southern District of New York (statutory three-judge court) entered on October 1, 1969, declaring Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance,

and Sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations (N.Y.C.R.R.), unconstitutional insofar as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits because the applicant or recipient refuses to consent to home visits by welfare officials and enjoining the defendants from enforcing any home visit requirement in the absence of consent or a valid search warrant.

Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court, dated June 13, 1969, is reported at 302 F. Supp. 478. It is reproduced herein as Appendix "A". The majority and dissenting opinions of the three-judge court, dated August 18, 1969, are reported at 303 F. Supp. 935. They are reproduced herein as Appendix "B". The final order of the District Court, dated October 1, 1969, is reproduced herein as Appendix "C". Theere were no separate findings of fact and conclusions of law.

Jurisdiction

The judgment and order of the District Court were entered on October 1, 1969. The notice of appeal was filed on October 24, 1969.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statutes and Regulations Involved

The relevant statutes and regulations, New York Social Services Law, § 134, New York Code of Rules and Regulations, Title 18, §§ 351.10 and 351.21 and Policies Governing the Administration of Public Assistance, § 175, are reproduced herein as Appendix "D".

Questions Presented

1. Do the New York statutes and regulations mandating home visits to applicants or recipients for AFDC assistance represent a valid state interest reasonably implemented?

2. Does a scheduled daytime home visit violate any right of privacy of the AFDC applicant or recipient protected by the Fourth, Fifth, Fourteenth or any other amendment to the Constitution?

3. Did the District Court apply the correct standard of proof in assessing the issue before it?

4. Did the District Court properly grant plenary declaratory and injunctive relief in view of the posture of the case when it was argued before that Court?

5. Should appellee have been required to pursue her state administrative remedies?

Statement of the Case

Claiming a violation of rights secured to her by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* and §§ 1381 *et seq.* and the regulations promulgated thereunder, appellee brought this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3)(4), 2201, 2202. The action was commenced by summons and complaint brought on by order to show cause served on the office of the attorney for appellant on Friday, June 6, 1969 and returnable on Tuesday, June 10, 1969.

The gravamen of the complaint was that the State could not enforce a policy of terminating Aid to Families with Dependent Children (hereinafter AFDC) assistance by virtue of the recipient's refusal to consent to home visits by local caseworkers because such a policy violated the right to be free from unreasonable searches and seizures and the right of privacy. Under New York law, a home visit is required to determine initial eligibility for AFDC assistance and is included as one of the means for redetermining eligibility. N.Y.C.R.R. 351.10, 351.21.

The appellee, Barbara James, was alleged to be the mother of a needy child and both Mrs. James and her son claimed to have no other income or resources for support other than the public assistance benefits received under the New York AFDC program.

The complaint alleged that on May 8, 1969, a caseworker in the New York City Department of Social Services, wrote to appellee requesting an appointment to visit her on May 14, 1969. Appellee contacted the caseworker and told her that, although she would be willing to supply any information that was "reasonable and relevant" to her need, any such discussions must take place not in her home but rather in the offices of the Social Services Department. The caseworker explained to appellee that regulations required a home visit and that her refusal to permit such a visit would result in termination of her welfare benefits. Appellee continued to refuse permission for a home visit.*

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* Appellee has never satisfactorily established even her initial eligibility for AFDC assistance and has consistently refused to supply information to the Department of Social Services. This, together with many other alarming features of appellee's history, is made clear from her case record with the New York City Department of Social Services. That record, which was submitted to the

(footnote continued on following page)

The sole basis set forth in the complaint for the refusal to consent to a home visit was that, on previous visits to the home of appellee "and, on information and belief, of all other persons similarly situated, questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility."

On May 13, 1969, the appellee was notified of the intention of the Department of Social Services to discontinue assistance because of her refusal to permit a home visit by her caseworker for purposes of recertifying her as eligible for AFDC benefits. On May 27, 1969 a "prior review" hearing was held at which plaintiff and her attorney once more refused to allow a caseworker into the home and termination of benefits was directed on June 2, 1969.

Based on these allegations, appellee claimed that her right of privacy was being invaded, that the termination of public assistance would cause irreparable injury and that state administrative remedies need not be exhausted.

The complaint sought the convening of a three-judge court to hear and determine the matter, and a temporary restraining order and preliminary injunction ordering appellees restored to the assistance to which they and the class they represent were entitled and ordering that the policy at issue not be enforced during the litigation. It further

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(*footnote continued from previous page*)

Court below and ordered sealed, has been ordered transmitted to this Court still sealed. Although appellant consented to the sealing below to forestall publication of any of the details contained therein, it does contain material highly germane to the issues on this appeal. In view of the uncertain scope of the restrictive order as it presently stands only limited reference is made to the record (Exhibit 1, annexed to Defendant Wyman's answer). However, included in our application for a stay, submitted herewith, is an application to conceal the case record or, in the alternative, to permit detailed reference to it.

sought a judgment declaring that the "policies and practices complained of" were unconstitutional; that welfare officials could not "discontinue, or reduce financial assistance, or otherwise interfere with the receipt of such assistance" because of the recipient's refusal to consent to entry without a search warrant, that there could not be a threat to take such action; that no consent could be deemed freely given unless the recipient were told that failure to consent could result in termination, reduction or interference with benefits; and, that there could be no entry or search of any rooms and no touching or examination of any objects except pursuant to a search warrant or on the basis of free consent after a warning that no adverse consequences could result from a refusal to consent.

The complaint also asked for a permanent injunction restraining entry into homes without search warrants or consent and restraining "[i]nterrogating or questioning an applicant for or recipient of public assistance regarding activities not demonstrably relevant to issues of eligibility."

The order to show cause requested a preliminary and permanent injunction restraining the defendants from entering the home of plaintiff and others similarly situated without either a warrant "issued upon probable cause" or the freely given consent of the recipient after a warning that he need not consent; the convening of a statutory three-judge court; a class action order pursuant to Federal Rules of Civil Procedure, Rules 23(a), (b)(2); and, a temporary restraining order preventing the discontinuance of aid to the named plaintiff because of her refusal to consent to a home visit.

On June 10, 1969, the return date of the order to show cause, appellant was given until June 13, 1969 to file a memorandum of law with respect to the need for a three-judge court and a temporary restraining order in behalf of Mrs. James. On June 13, the memorandum was filed and, on that very day, the District Judge, the Honorable

Charles Tenney, issued a written opinion holding that "the recent decisions in *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* [394 U. S. 618]; *King* v. *Smith*, 392 U. S. 309 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *McDonald* v. *United States*, 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967), necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein."

Disregarding the more limited request of the order to show cause, the court went on to issue a temporary restraining order with respect to "all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes" since denial or termination of aid to them in the event of refusal would cause irreparable injury "both clear and abundant, while the cost to the State and City is obscure and minimal." The temporary restraining order contained the warning provision sought by appellee only in the preliminary and permanent injunctions.

Finally, the single district judge, notwithstanding appellant's argument that such a finding should be made only by the three-judge court, determined that the action "may properly proceed as a class action pursuant to Fed. R. Civ. P. 23."

The three-judge court was designated the following week. In addition to Judge Tenney, the Court consisted of Circuit Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit and District Judge Edward C. McLean of the United States District Court for the Southern District of New York. Appellee was required to file her papers by June 23, 1969. Appellant

had until June 26, 1969 for answering papers and oral argument was set for June 30, 1969.*

On August 18, 1969, the Court, Judge McLean dissenting, rendered its written opinion holding the state policy unconstitutional. The majority opinion, written by Judge Tenney, started from the fundamental proposition that "[t]he overriding function and basic purpose of this Amendment (the Fourth) is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials," and moved on to the assertion that "a search without a warrant or proper consent is presumptively 'unreasonable' ". On this analysis, Judge Tenney viewed the issues as being whether required home visits are searches within the meaning of the Fourth Amendment; whether the Fourth Amendment was designed to protect appellee and her class; and, if both questions were answered in the affirmative, whether the State of New York could condition AFDC benefits on a "waiver of rights embodied in the Fourth Amendment".

After characterizing as "frivolous" any contention that home visits were not searches within the meaning of the Fourth Amendment and pointing out that "[t]he guarantee of protection against unreasonable searches extends to the innocent and guilty alike" and is not limited to a protection against the search for evidence of crime, the majority stated that:

> "[G]overnmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud

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* Appellee filed a memorandum of law and identical supporting affidavits by twelve other welfare recipients. Appellant filed an answer and exhibit consisting of appellee's case record with the New York City Department of Social Services, an affidavit by Eleanor Walsh, Deputy Commissioner of the New York State Department of Social Services and a memorandum of law. Defendant Goldberg filed an affidavit and an answer.

> or other criminal activity . . . To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely 'social problem'."

The majority thus reached the conclusion that appellee was entitled to "the guarantees of the Fourth Amendment" and added that the characterization of AFDC grants as a privilege did not mean that such grants could be conditioned on the relinquishment of a constitutional right.

The reality of the problems inherent in its position was briefly noted and quickly disregarded by the majority opinion:

> "While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor."

Relying exclusively on a series of First Amendment cases, Judge Tenney stated that it was not sufficient to show "a

rational relationship to some valid governmental policy" nor to show "merely that the public interest justifies the type of search in question."

It was the majority opinion that there could be no general exception to the constitutional warrant requirement where the public interest could be preserved and "[p]ermissive [*sic*] legislative goals" achieved by means "more narrowly" designed. The majority went on to propose a series of "[L]ess drastic means for achieving the same basic purposes for which the City and State urge home visits are designed". The Court, thus, viewed a duly-executed lease as proof of actual residence, birth certificates as proof of family composition, the availability of medical facilities as adequate to ascertain the well-being of the child, and the availability of information about goods and services in the offices of the Department "should the recipient wish to make her needs known there" as adequate to determine those needs. Finally, the Court found that "[t]he regularity of school attendance, academic achievement and information gathered from the interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home." Maurice James, the child of appellee, is two years old.

In the opinion of the majority "any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case" an application may be made for a search warrant based on probable cause within the meaning of *Camara* v. *Municipal Court,* 387 U. S. 530, and "a suitably restricted search warrant" could issue.

The majority was also of the view that the home visit could be construed as designed to obtain evidence of criminal activity since New York Social Welfare Law, § 145 requires welfare officials to provide any information it obtains of such activity to prosecuting authorities and since, in 1933, the County Court of Westchester County

purportedly gave the law a broad interpretation. *People* v. *LaFace*, 148 Misc. 238, 266 N.Y.S. 458. Because "home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity . . . they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given."

After rejecting the argument that appellee must first pursue available administrative remedies, the opinion went on to distinguish the case of *Colonnade Catering Corp.* v. *United States*, 410 F. 2d 197 (2d Cir.), *cert. granted*,—— U. S. ——, 38 U.S.L. Week 3127 (October 13, 1969), upholding a conviction following a warrantless search by Internal Revenue agents of the licensed premises and the seizure of untaxed liquor. Judge Tenney said that the Second Circuit had found that, in contrast to *Camara* v. *Municipal Court, supra*, and *See* v. *City of Seattle*, 387 U. S. 541, the statutory inspection authority and *Colonnade* was "carefully defined and narrowed" and "granted 'little if any, more authority than that which would be extended in a warrant issued by a magistrate after review.' " The majority found "no such limitations upon the power of caseworkers" holding it insufficient that workers were not allowed to enter by force or under false pretenses or to look in closets and drawers. The opinion also relied on the distinction drawn by the Second Circuit between homeowners and licensees with respect to their knowledge of the limitations on inspection power.

Finally, the Court acknowledged that, "[T]here exists a pressing State interest in preventing such anti-social behavior as child abuse or neglect"; it recognized "the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved" and it "hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their 'clients'." It concluded, however, that "[t]he

laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure."

In dissent, Judge McLean first brought out the question of the children:

> "We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law."

Dealing with the warrant question, Judge McLean pointed out that the majority had left unclear the showing necessary to obtain a warrant but that, if the showing required was probable cause that the law had been violated, "the fundamental purpose of the program is ignored" and if a warrant could be obtained "merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality". Judge McLean said that reading records, if they were available, "cannot be an adequate substitute for first-hand observations of living conditions in the home". He thought that the only result of a warrant procedure would be "to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust".

Judge McLean viewed the *Camara* and *See* cases as distinguishable on their facts and concluded that the majority's extension of those cases to the instant case was "striking a damaging blow to the successful administration of this important social welfare program".

Despite the short time which the parties had had to prepare the case, despite the offer to produce additional material made by appellant at oral argument, despite the fact that appellant's memorandum of law was limited only to the question of a preliminary injunction and despite the fact that issue had been joined by the answers to the complaint, the District Court granted declaratory relief and a permanent injunction. The District Court did not enter its final order until October 1, 1969, some five weeks after the decision. That order did not include the stay requested by appellant. One week later, appellant sought a stay from Mr. Justice Harlan who denied it on October 21, 1969 stating:

> "While I am of the view that the issues involved in the State's proposed appeal are not insubstantial, I nevertheless am of the opinion that, primarily for two reasons, the stay requested of me should not issue. First, I am not convinced at this stage that the strength of the State's case is such as to justify my delaying the effectuation of the order of the District Court. Second, the balance of the equities involved in the granting or denial of a stay seems to me at this juncture to lie with the appellees.
>
> The application for a stay is accordingly denied, with leave to the State to renew its application to the full Court at the time of the filing of its Jurisdictional Statement."

The renewed application for a stay is submitted herewith.

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

Relying on a mechanistic interpretation of the Fourth Amendment and failing to take account of the only concern of the program with which it was dealing, the child, the

decision below has dealt a serious blow to the effective administration of the most extensive AFDC program in the country.* The majority acted prematurely, precipitously and under erroneous standards to reach a result which serves neither personal well-being nor constitutional rights.

1. The holding of the District Court that New York may not require an AFDC applicant or recipient to permit a home visit by a caseworker in order to establish eligibility for such benefits severely hampers the effective administration of this large important program.

The AFDC program in New York City alone involves 187,214 cases, totalling 722,830 persons receiving benefits amounting to $53,620,000 a year.** The decision below necessarily affects the administration of the program with

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* Many States require home visits for initial and some for continuing eligibility for AFDC benefits. See *e.g.*, Ala., Manual for Administration of Public Assistance, Part I-8 (B) (1968 rev.); Ariz., Regulations promulgated pursuant to Revised Statute § 46-203, Reg. 3-203.6 (1968); Cal. State Dept. of Social Welfare Handbook, C-012.50 (1964); Fla. Public Assistance ch. 100; Ga. Division of Social Administration—Public Assistance Manual, Part III, Sec. V (D)(2), Part VIII (A)(1)(b) (1969); Mich. Public Assistance Manual, Item 243 (3) (F) (Rev. 1967); Miss. Code 1942 § 7177 (Laws of 1940 ch. 294); Mo. Public Assistance Manual, Dept. of Welfare, Sec. III (1969); Nebraska, State Plan and Manual Regulations, Part IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, Part II, §§ 2120, 2122 (1969); N. M. Public Welfare Act, 13-1-13, Health and Social Services Department Manual §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV (D)(2); S. Dak. L. 1967, 28-7-7 (formerly SDC 1960 Supp. 55.3805); Tenn. Code Ann. 14-301 *et seq.* 37-309, Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wisc. Public Assistance Law Sec. 49.19(2).

** 1968 figures. COMMITTEE ON WAYS AND MEANS, U. S. HOUSE OF REPRESENTATIVES. *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), Tables A-13; A-15. (Hereinafter, *Report of Findings of Special Review*).

respect to all of those persons as well as those in the rest of the State and with respect to anyone who in the future may assert eligibility for AFDC assistance. The required home visit struck down by the Court below is an integral part of the AFDC program and directly implements its purposes.

The purpose of the AFDC program is to provide for children who have no other means of support. The Court below wholly ignores them. It was the judgment of both Congress and the New York State legislature that children of parents with inadequate resources for their upbringing are, nevertheless, best cared for in the first instance in the home rather than in institutions and that, to effectuate this policy, it might be necessary to provide aid both to the child and to a parent or guardian. In assuming responsibility for the child, however, it was not the decision merely to dispense funds to the parent without regard to whether or not the child could be adequately cared for even with such aid. For, if the money allocated is not being spent to achieve the purposes of the program, there is no point to the allocation and the money either is not needed or the child is being harmed. Thus, while appellee is called a recipient, she receives payments not because she is needy but because she is a person whose services are required for the needy person, her child. She has undertaken a specific obligation not only to her child but to the State to which she has turned on her child's behalf. The focus is the child in the home. See 42 U.S.C. § 602. The Federal Handbook of Public Assistance Administration (Part IV, § 3452[10]) requires the assessment of "total parental functioning and home conditions upon the child." New York has expressed similar concern. N. Y. Social Services Law §§ 348-350, 353-354; 18 N.Y.C.R.R. § 369.2(c): "A child or minor shall be considered to be eligible for AFDC if his home situation is one in which his physical, mental and moral well-being will be safeguarded . . ." The continuing interest in the well-being of the child requires that:

"The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility . . ." 18 N.Y.C.R.R. § 369.4(b).

Where the law makes it perfectly clear that the home situation is the critical factor in the program, it is completely unrealistic to hold that the home may not be viewed by objective personnel or that there are adequate alternatives to such a view. The home visit provides information which it is conceded must be provided and which cannot reliably be obtained in any other fashion. First, the home visit serves to verify the need for assistance. While financial resources might be examined outside the home, household furniture and furnishings, for example, cannot. Second, it serves to verify family composition, including the number of persons actually resident in the home and third, it serves to verify actual residence at the address provided. In addition to verifying the technical eligibility criteria, the home visit insures that the child's day-to-day well-being is adequately protected:

> "An agency may provide recipients with a list of services available, but the recipient may not be aware or willing to acknowledge his need of a particular service, or for some reason may not request it. On the other hand, an alert and interested worker in a home visit may identify needs for which the agency may offer help, e.g., need for more adequate furnishings (which may be obtained from another community resource) or for repair of or removal from unsafe conditions, such as rickety steps or flooring . . . [or] unsafe heating devices. Help can be offered to improve housekeeping or child care though service might never be requested." (Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York, Record on Appeal, Document No. 17.)

Such service is not optional with the parent when it goes to the suitability of the home environment for the child and, hence, the suitability of AFDC assistance. For assistance purposes, the parent is one factor in the home of the child. The determination of eligibility is also a recognition that the household is dependent on extra-familial resources and represents a shift in primary responsibility for the child. Thus, the judgment of the parent cannot be the final word. To the extent that the parent interposes a barrier between the child and the agency now charged with its welfare, their interests conflict and the mother may not be presumed to be acting for the child or protecting his interests.

The AFDC child is peculiarly susceptible to the hazards of life, to neglect and even abuse, not necessarily for want of love, but for want of means. He is, by definition, a one-parent child and may be one of several children in the family. The amount allocated for his care admits of no leeway in expenditure, the available housing is scarcely first-rate, there is no money available for baby-sitters. These are built-in factors for the creation of serious physical and emotional problems. Thus, the recently much-mooted problems of child neglect and abuse are inherently more prevalent in assistance households, a fact recognized by federal authorities. Advisory Council Report, U. S. Dept of Health, Education and Welfare; Welfare Administration, Bureau of Family Services, April, 1963. Indeed, the recent report on the administration of the New York City AFDC program (Report of Findings of Special Review, *supra*, p. 5) was in part based on home visits. Although federal regulation does not mandate home visits of all welfare clients it clearly mandates some (Handbook of Public Assistance Administration, Part II, § 6200).

The State of New York has, therefore, promulgated a rule that initial eligibility must be determined by a home visit (18 N.Y.C.R.R. § 351.10) and the required recertifica-

tion every three months must be determined by an interview or a home visit (18 N.Y.C.R.R. § 351.21).

The untenable and unrealistic view taken by the opinion below is highlighted by its recitation of "alternatives" for the home visit. Thus, the opinion considered that actual residence could be verified by a duly executed lease. The dissent pointed out that leases often are non-existent. Moreover, if the lease were to be the test of welfare eligibility, appellee would not be eligible since her lease was executed by a person described by her as her brother but on the lease as her husband (Defendant's Exhibit "1"). The majority below pointed out that family composition could be determined by birth certificates, but there is no reason for birth certificates accurately to reflect the persons actually in residence on the premises. The suggestion that the welfare of the child can be adequately discerned by examination of school records is not only irrelevant in this case, which involves a two-year-old child, but provides an inadequate substitute for a home visit which examines areas not necessarily relevant in a report prepared by an unknown third person not directly concerned with the problems involved. Medical examinations, while an obvious and important feature of the welfare of any person, may also provide merely *post-facto* evidence of a situation which might have been prevented and which might be prevented from recurring.

It is, however, with its final "alternative" that the majority below makes clear the thrust of its opinion and the weakness of its position. The majority decides that information about needed goods and services can be furnished by the recipient "if desired", supporting its conclusion by referring to the fact increasing emphasis is being placed on "declaration" of need rather than on investigation. As we have said, certain needs and services are not optional with the parent. Moreover, that this is a possible alternative, with respect to all factors of eligibility, does not make

it a constitutionally required one. It is for the Legislature to determine if the program can effectively operate without home visits, a decision which most authority seems to feel must be in favor of the visit. As the District Court said in *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U. S. 323:

> "The plain flaw that nonetheless destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.
>
> Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us.
>
> • • •
>
> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so.* • •
>
> The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing

and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality." (*Id.* at 862, 863).

The home visit falls well within the power of the state to adopt reasonable policies for administering welfare funds. *King* v. *Smith*, 392 U. S. 309 (1968). The Legislature can validly determine that it will not abdicate its responsibility by deferring to parental judgment in assessing the home. The instant case provides ample support for such a judgment. Appellee has never satisfactorily established her initial eligibility for assistance she has a serious money management problem, and, most important, she has a child who, in the first year of his life, was in the hospital two times, including once with a skull fracture. Appellee has also had complaints to make about the condition of her apartment, some of which were verifiable, and some of which were not.

Appellee's offer to submit to an interview outside her home is clearly not a viable alternative to the home visit requirement. Indeed, in view of appellee's lack of candor throughout her case history and her persistent refusal to cooperate and to provide relevant information no matter where she was asked it, her dependability in this regard is dubious at best.

In short, the home visit is not only a reasonable method for obtaining validly required information, it is often the only reliable way. The "alternatives" supplied by the opinion below are inadequate and fail completely to take account of the only relevant factor—the welfare of the child—the basis upon which AFDC aid is predicated.

2. The holding of the District Court that New York may not require an AFDC applicant or recipient to permit a home visit by a case worker raises serious questions respecting the proper interpretation of the Fourth and Fourteenth Amendments to the Constitution.

The interrelationship between the required home visit and the Constitution was analyzed in an inadequate and erroneous manner by the opinion below. The majority regarded the visit as a "search" within the meaning of the Fourth Amendment, holding appellee to be entitled to the protection of the Fourth Amendment, deemed a visit made only on threat of termination of aid to be an unconsented search and concluded that there could, therefore, be no such entry without a "valid search warrant", leaving for speculation any standards for such a warrant.

We have no quarrel with the proposition that appellee is entitled to the protection of the Fourth Amendment. However, the procession of "therefores" emerging from the analysis below misses the mark. For within the rubric of the Fourth Amendment lies the concept of reasonableness, a concept given short shrift by the majority. As this Court has held "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967) (emphasis supplied). Under any proper analysis, the home visit without a warrant is not arbitrary and is reasonable.

The opinion concedes as appellee conceded, and as we have shown, that the applicant or recipient has an obligation to provide the information necessary to establish eligibility for assistance. Appellee, making her own decision as to what is relevant, offers to provide such information outside her home. The offer, besides being of dubious value (Exhibit "1"), cannot foreclose examination of the

home which has a testimonial value of its own (see 1, *supra*). Appellee has not only not contested her obligation to provide information, she has never hinted that process is necessary to compel her attendance at an inquiry into her eligibility for the benefits she seeks or that the body from which she seeks assistant must provide her with testimonial immunity as well. It is strongly to be doubted that if appellee refused to answer questions relevant to her eligibility, even on Fifth Amendment grounds, she would be denied due process if she were also denied aid. See *Gardner* v. *Broderick,* 392 U. S. 273, 279; *Piemonte* v. *United States,* 367 U. S. 556, 559 n. 2; *Ullmann* v. *United States,* 350 U. S. 422, 431; *Brown* v. *Walker,* 161 U. S. 591, 600.

The invocation of the Fourth Amendment in this respect stands on no firmer ground. Appellee's obligation to furnish information extends in this situation to her residence. The right of privacy in that is no greater than her right of privacy in herself and in her answers. "For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States,* 389 U. S. 347, 351 (1967). By making her home a relevant factor to circumscribed but important government concerns, appellee has limited her privacy because of the existence of the primary concern, the child, and has committed herself to a course of providing relevant information. This course does not violate the privilege against self-incrimination.

Thus, the reliance of the majority below on the possibility of criminal prosecution is misplaced. The remote possibility of criminal prosecution, which underlies any situation where benefit is sought to be secured by the furnishing of information, should not serve to place the entire administration of a program within the confines of the standards to be observed in conducting criminal prosecutions. See

United States v. *Walden*, 411 F. 2d 1109 (4th Cir. 1969). Obviously it is not the purpose of the home visit to obtain information for prosecutorial purposes. Contrast *Gardner* v. *Broderick, supra; Parrish* v. *Civil Service Commission*, 56 Cal. 260, 425 P. 2d 225, 57 Cal. Rptr. 623 (1967). This is strongly evidenced by the fact that the home visit was sought to be made here on a week's notice and by the fact that both state and local law and regulation make it abundantly clear that during the home visit there is to be no prying into closed places such as closets and drawers. N. Y. Social Services Law, § 134-a; Bulletin 916, N. Y. Department of Social Welfare, April 28, 1967, Appendix "E" (Record on Appeal, Document 15, Appendix "A"); Informational No. 67-41, N. Y. City Department of Social Services, July 3, 1967 (Record on Appeal, Document 15, Appendix "B"). Appellee, who has had home visits in the past, does not allege that her privacy was invaded in any such manner.

Even the problem of overpayment, which is particularly acute in New York City (Report of Findings of Special Review, *supra*), may provide no basis for criminal prosecution and need not be dealt with on that level. However, the agency certainly must know if it is indeed overpaying and should be able to correct the error. Should evidence nevertheless be obtained which might be made the basis of a criminal prosecution, it is a simple matter at the time of that prosecution to test the matter by motion to suppress any evidence obtained as a result of the home visit. *Murphy* v. *Waterfront Commission*, 378 U. S. 1; *United States* v. *Blue*, 384 U. S. 251, 256.

The proper framework for considering this case was set forth by this Court in *Schmerber* v. *California*, 384 U. S. 757, 768:

> "We begin with the assumption that once the privilege of self-incrimination has been found not to bar compelled intrusions . . . The Fourth Amendment's proper

function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances or which are made in an improper manner."

In the instant cases, as we have suggested, the visit is actually made on the consent inherent in the application for assistance which places the recognized responsibility on the applicant to provide relevant information.

Even if such consent is not deemed binding, the home visit is not an unreasonable intrusion even without a warrant.

Relying on its analysis of the home visit as a search within the meaning of the Fourth Amendment, the majority below held that, absent emergency, such a search was presumptively invalid relying on traditional search and seizure cases and on the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530. The Court said that such a presumption could not be overcome except by a compelling state interest which it found not to exist here. Of course, as point 1, *supra* amply indicates, the home visit does serve compelling state interests. Certainly it was simplistic to say that a warrant has always been required in this situation since the situation has never arisen before.

In any event the home visit is not a search in any traditional sense. This is not to say that it is not to be measured by Fourth Amendment standards of reasonableness—it is to say that its nature is to be taken into account as part of the assessment of its constitutionality. The home visit is not a search for incriminating evidence, it is not an inspection of an objective situation such as electrical wiring or other building violation and it is not directly enforceable by criminal sanction. It is a complex of tangible and intangible factors not designed to verify any isolated condition but directed to all of the factors bearing on the welfare of the children in the household and the fact

that allocated funds are being directed to that welfare. A search warrant, which is by definition a document specifying what is to be searched and seized is not, even after *Camara*, designed to deal with such a situation. It could not be specifically designed to cover all of the possibilities, unlike even the area inspection warrant directed to a specific problem.

Illustrative of the inappropriateness of a search warrant procedure is the remarkable lack of congruence among the complaint, the relief sought and the relief granted. The gravamen of the complaint, albeit in most conclusory terms, is that questions are asked during home visits which seek private information which are not relevant to the need for assistance. The allegation was not supported with even a single example. Nor was any explanation offered as to why questions are more irrelevant in the home than they are in the offices of the Department of Social Services. The District Court made absolutely no effort to deal with this aspect of the complaint, which certainly is not solved by a warrant and which, as we have said, is the entire basis for the complaint. The warrant solution simply creates more problems than it solves and insulates the child from the benefits which the AFDC program was designed to confer.

The regulations covering the conduct of a home visit narrow its scope as well as any warrant procedure possibly could. In the instant case there is no indication of any abuse of this policy. The visit which was refused was sought to be made by appointment a week in advance. On previous visits the worker always respected appellee's privacy in for example, not entering the bedroom when access was refused and neither threatened to nor terminated aid as the result of such refusal. By contrast, the cases relied on by the Court below involved either situation where no legitimate government interest was at stake (*Griswold* v. *Connecticut*, 381 U. S. 479) or an intolerable abuse of personal liberty. *Parrish* v. *Civil*

Service Commission, 57 Cal. Rptr. 623, 425 P. 2d 223 (1967).

Nor are the administrative search warrant cases applicable here. First, they involve the right to secure area search warrants to look for evidence of building violations and entry was enforceable by criminal sanction. Moreover, in those cases there was an attempt to enter premises by persons who had no special relationship to the plaintiffs. Plaintiffs had sought nothing and no question of eligibility for any benefit or proper allocation of public funds was involved. The principle reason why warrants were held to be required for area inspections was:

> "Under the present system, when the Inspector demands entry, the occupant has no way of knowing whether enforcement of the Municipal Code involved requires inspection of his premises, no way of knowing the lawful limits of the Inspector's power to search, and no way of knowing whether the Inspector himself is acting under proper authority." *Camara* v. *Municipal Court, supra* at 532.

See also *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263. By contrast in the instant case, the applicant or recipient knows that home visits are to be conducted, and the authority and limits of the inspection. Indeed, in this case appellee herself circumscribed the limits of the visit on more than one occasion with no adverse results.*

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* See also *United States* v. *Stanack Sales Co.,* 387 F. 2d 849 (3rd Cir. 1968); *Durovic* v. *Palmer,* 342 F. 2d 634 (7th Cir. 1965), *cert. den.* 382 U. S. 820; *Peeples* v. *United States,* 341 F. 2d 60 (5th Cir. 1965); *United States* v. *Duffy,* 282 F. Supp. 777 (S.D.N.Y. 1968).

In reaching its result the Court below departed from the decision of its own Court of Appeals in *Matter of Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197, *cert. granted* 38 U.S.L. Week 3127 (October 13, 1969), in which the Court upheld the entry by agents of the Internal Revenue Service into licensed liquor prem-

(*footnote continued on following page*)

Moreover, warrants would be inimical to the successful administration of the AFDC program. As Judge McLean pointed out in dissent, "the warrant . . . [will] introduce a hostile relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust." The welfare worker would be transformed into a policeman and thus, in fact, undercut the privacy and dignity of the individual. A barrier would be erected between the worker and the child and the administration of the program would be severely straitened. *Cf. Flemming* v. *Nestor*, 363 U. S. 603.

Finally, no standards are set forth for the issuance of the new warrants. Must criminal standards be met because of the spectre of criminal prosecution? Must some other standard of probable cause be met? Is the requirement of periodic recertification a sufficient basis? If so, what is the use of the warrant? Is it really true that even an initial applicant may require a warrant be obtained? Is it necessary or sufficient to show refusal of entry? Or must a worker examine for example a school record and bring it before a magistrate for him to determine if a warrant is justified? And what would be sufficient? Tardiness? Low grades? Or must it be persistent truancy? Failure? Is this sort of determination really a constitutional question? Of course, none of these questions was raised by the administrative warrant cases, but the District Court, finding a superficial resemblance has created a myriad of serious problems by its reliance on them.

(*footnote continued from previous page*)

ises without a warrant. Indeed, in that case the refusal to submit to the inspection resulted in a forced entry and seizure and criminal prosecution. The Court viewed the statute in that case as being as narrowly limited as a warrant and found that the licensee should be expected to know the limits and authority of the scope of inspection. Under this rationale no warrant is required in the instant case either.

3. The District Court applied an incorrect standard of constitutional law in the instant case.

The District Court held that the burden was on the State to show that it had a compelling state interest in making the required home visit. This standard was improper. In the first place that standard has thus far been applied only in equal protection cases and not in cases involving claims of deprivation of due process. See e.g. *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U. S. 323 (1969), where the three-Judge District Court held (281 F. 2d at 862, note 19):

> "Our point is a narrower one that the limited right of substantive due process insures only against the capriciousness reaching a level of irrationality not against judgments of policy that may be unwise or even 'harsh' in their balancing of competing interests."

Indeed, the inappropriateness of the standard announced by the District Court is evident from the fact that it in effect holds that there must be a compelling State interest in making even a reasonable search and seizure, to use its term. In any event, it is clear that there is a compelling State interest in the home visit.

4. The District Court acted prematurely and precipitously in granting plenary relief to appellee.

Proceeding on a time schedule which effectively precluded one of the defendants from even filing opposing briefs (Record on Appeal, Document No. 14) and which severely circumscribed the ability of appellant to produce additional material in support of its position, the District Court granted both a preliminary injunction and declara-

tory relief.* Declaratory relief was jurisdictionally unwarranted since, although answers were filed to the complaint, there was no finding with respect to any disputed issues of fact and no motion for summary judgment. This jurisdictional deficiency was compounded by the fact that in granting the permanent injunction the Court ignored the offer to obtain additional material made by appellant at the time of oral argument and ignored the fact that appellant's memorandum of law was limited to the question of a preliminary injunction. It is the same judicial impatience which brought the jurisdictionally deficient decision in *Golden* v. *Zwickler*, 394 U. S. 103, and produced the anomalous opinion in the present case barring New York from doing the most elementary and indispensible act vital to the achievement of the purposes of the AFDC program throughout the nation. It is an incontrovertible fact that without the opportunity for the home visits required by both federal and state provisions the rationale for the carefully designed AFDC program could not function.

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* It is also appellant's position that the single district judge had no authority to denominate this as a class action (*Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713) and that, in any event, there is a difference of position between an initial applicant and a recipient which makes it inappropriate to consider them as a single class.

In addition, appellee should have been required to exhaust her administrative remedies. In this case, appellee requested and received a hearing prior to the termination of assistance. Thus, unlike the situation in *Damico* v. *California*, 389 U. S. 416, there was here a prior invocation of state procedures which appellee should not be able to abandon in mid-stream to seek a federal forum. Exhaustion of administrative remedies was particularly important in this case because of the vague nature of the complaint and the essentially administrative nature of the relief sought. As we have said (*supra*, pp. 4, 22), appellee was essentially complaining about being asked unspecified questions. The nature of the questions asked, as well as the timing and other details of interviews are properly resolved by the administrative body involved.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, December 18, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant Wyman

SAMUEL A. HIRSHOWITZ
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Appendix "A"

Opinion

Tenney, J.

Plaintiff, individually and on behalf of her minor child and all other persons similarly situated, moves this Court for an order: a) convening a district court of three judges pursuant to 28 U.S.C. §§ 2281, 2284 for the purpose of hearing and determining her application for a permanent injunction restraining and enjoining the defendants from enforcing certain New York State Department of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States; b) granting a temporary restraining order pursuant to 28 U.S.C. § 2284(3) restraining the defendants from discontinuing, reducing or denying public assistance grants to all persons who object to the continued enforcement of the regulations challenged herein; and c) determining that this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2).

Plaintiff has been a recipient of Aid to Dependent Children benefits (hereinafter referred to as "ADC") for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit plaintiff in her home on May 14, 1969. In reply, plaintiff explained that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumstances could the caseworker make a home visit. The caseworker explained that Department of Social Services Regulations require that she visit plaintiff in her home to discuss recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her ADC benefits. While reiterating her

willingness to provide whatever information was requested at the offices of the Department of Social Services, plaintiff continued to deny her caseworker entry into her home.

On May 13, 1969, the New York City Department of Social Services sent plaintiff a notice of intent to discontinue her ADC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the Department of Social Services. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

It is well settled that the convening of a three-judge district court pursuant to 28 U.S.C. § 2281 is not required where the claim involved is "obviously without merit", where the constitutional questions presented are "insub-

stantial" in that prior court decisions have clearly and unequivocally foreclosed the matter in dispute or where the suit seeks merely to enjoin local officers seeking to enforce statutes of local as opposed to general or statewide application. 33 Brooklyn L. Rev. 157, 159-60 (1966). I find that the issues presented herein are neither insubstantial nor obviously without merit, and that the regulations sought to be enjoined are of statewide applicability. Without intimating any opinion on the merits of the within action, it seems abundantly clear that the recent decisions in *Thompson* v. *Shapiro,* 270 F. Supp. 331 (D. Conn. 1967), *aff'd* —— U. S. ——, 37 U.S.L.W. 4333 (1969); *King* v. *Smith,* 392 U. S. 309 (1968); *Griswold* v *Connecticut,* 381 U. S. 479 (1965); *McDonald* v. *United States,* 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda,* 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967) necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein.

Pursuant to 28 U.S.C. § 2284(3), this Court "may at any time, grant a temporary restraining order to prevent irreparable damage." Based upon plaintiff's affidavit of June 6, 1969, such an order would seem appropriate at the outset of this action to prevent the termination of ADC benefits which ensure at least a minimal subsistence level of life and health for plaintiff and her child. *Ramos* v. *Health & Social Services Bd.,* Civil No. 67-C-329 (E. D. Wis., filed Nov. 7, 1967). Moreover, since the enforcement of the home visit regulation must inevitably cause irreparable injury to all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes, a restraining order protecting them from the denial

or termination of such grants based upon this refusal is equally necessary pending the determination by the full court of plaintiff's application. The harm to plaintiff and others similarly situated from continued enforcement of the regulations challenged herein is both clear and abundant, while the cost to the State and City is obscure and minimal. *Hernandez* v. *Freeman*, Civil No. 50333 (N. D. Cal., filed Dec. 30, 1968); *Burns* v. *Montgomery*, Case No. 49018 (N. D. Cal., filed April 19, 1968); *Griffin* v. *Bonin*, Civil No. 13,521 (W. D. La., filed March 7, 1968); *Alvardo* v. *Dunn*, Civil No. 12,399 (D. Conn., filed Feb. 14, 1968); *Ramos* v. *Health & Social Services Bd., supra.*

Finally, in that this Court is satisfied that: a) the class which plaintiff seeks to represent is so numerous that joinder of all members is impracticable; b) there are questions of law common to the class; c) the claims of the representative party are typical of the claims of the class; d) the representative party will fairly and adequately protect the interests of the class; and e) the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole, this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23.

In order to effectuate the terms of this opinion, a temporary restraining order has been entered effective at 4:00 P.M. on June 13, 1969.

So ordered.

Dated: New York, New York, June 13, 1969

CHARLES W. TENNEY
U.S.D.J.

Appendix "A."

FOOTNOTES

[1] "The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

Appendix "A."

TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

69 CIV. 2448

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York; GEORGE K. WYMAN, individually and as Commissioner of the State of New York Department of Social Services,

Defendants.

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2284(3), for a temporary restraining order restraining Defendants Wyman and Goldberg from discontinuing or reducing public assistance grants to Plaintiff and the class she represents, for refusing to consent to a welfare official's entry into her home without a valid search warrant. This motion having been considered by this Court:

Upon the pleading, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, and upon the finding by this Court that (1) substantial questions have been raised as to the constitutional validity of

the State Statute and regulations requiring home visits as a condition for the receipt of public assistance, which require further consideration by a statutory three-judge Court, and (2) Plaintiffs are now suffering irreparable injury when their aid is reduced or discontinued upon their failure to allow the welfare official to enter their homes, it is

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination by a statutory three-judge Court of the constitutionality and validity of the State Statute and regulations requiring a home visit as a condition to the continued receipt of public assistance that:

1. Defendants, their successors in office, agents and employees, and all persons in active concert and participation with them, are hereby restrained from entering into the dwelling places of plaintiffs and other similarly situated, without obtaining a valid Search Warrant issued upon probable cause or on the basis of consent of the recipient freely given after the employee or welfare official has clearly stated to the recipient that failure to give such consent will not result in discontinuance, reduction or denial of welfare assistance or criminal prosecution.

Dated: New York, New York, June 13, 1969.

CHARLES W. TENNEY
U. S. D. J.

Effective 4:00 P.M. June 13, 1969.

CWT.

Appendix "B"

Opinion

Tenney, District Judge:

Plaintiff, individually and on behalf of her minor child and all other persons similarly situated, seeks injunctive and declaratory relief pursuant to Rule 57 of the Federal Rules of Civil Procedure and Section 1983, United States Code, Title 42, to secure rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States, and Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, 1381 *et seq.*, and the regulations promulgated thereunder. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343(3)(4), which provides for the original jurisdiction of district courts in suits authorized by 42 U.S.C. § 1983, and by 28 U.S.C. §§ 1331, 2201, 2202.

This suit, commenced by order to show cause on June 6, 1969, seeks to prevent the termination of Aid to Families with Dependent Children (hereinafter referred to as "AFDC") benefits for failure to consent to the entry into plaintiff's home of officials of the Department of Social Services (hereinafter referred to as "the Department") upon the grounds that such termination constitutes a violation of both plaintiff's right to be secure in her home from unreasonable searches thereof and of her right to privacy. By order dated June 13, 1969, the District Court Judge, after memoranda and affidavits had been submitted and oral argument had thereon: (1) ordered, pursuant to 28 U.S.C. §§ 2281, 2284, the convocation of a statutory three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein; (2) found that the action may properly pro-

ceed as a class action pursuant to Fed. R. Civ. P. 23; and (3) granted, pursuant to 28 U.S.C. § 2284(3), a temporary restraining order protecting plaintiff and the "class" she represents from the denial or termination of AFDC benefits based solely upon their refusal to consent to the entry of officials of the Department into their homes, pending the determination by the full court of plaintiff's application.

Thereafter, additional memoranda and affidavits were submitted, and, on June 30, 1969, oral argument was had before the three-judge court.

The facts underlying the issues presented reveal that plaintiff, a resident of the City and State of New York, Bronx County, has been a recipient of AFDC benefits for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit her at home on May 14, 1969. Plaintiff replied that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumstances could the caseworker make a home visit. The caseworker explained that Department regulations require that she visit plaintiff in her home to discuss the recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her AFDC benefits. While reiterating her willingness to provide whatever information was requested at the offices of the Department, plaintiff continued to deny the caseworker entry into her home.

On May 13, 1969, the Department sent plaintiff a notice of intent to discontinue her AFDC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the offices of the Department. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after

determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance, to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

In opposition to plaintiff's application for a permanent injunction restraining and enjoining the enforcement of these City and State Departments of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States, defendants argue that: (1) the home visit is neither a search nor a seizure, but is merely designed to verify information as to eligibility for public assistance and is thus reasonably related to a valid governmental policy;[3] (2) the home visit is designed to make available to the recipient of AFDC benefits professional counseling so that the recipient can best utilize his limited resources;[4] (3) since the receipt of public assistance is a privilege, citing *King* v. *Smith,* 392 U. S. 309 (1968), plaintiff is obligated to provide necessary information so that this privilege can be recognized and implemented;[5] and (4) in contradictory statements,

"[t]here may be fraud . . . which should come to the attention of the administrative agency and which would not without home visits,'" and "[i]t is not the purpose of home visits to look for evidence of fraud or other criminal activity and there is no suggestion that entry is sought for these purposes.'"

The issue presented for determination by this statutory court, simply put, is whether the Department of Social Services can deny, reduce or terminate AFDC benefits to otherwise eligible persons who refuse to allow caseworkers to enter their homes without a warrant, issued upon probable cause. For the reasons which follow, we find that the Department may not.

The Fourth Amendment to the Constitution explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The overriding function and basic purpose of this Amendment is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials. *Camara* v. *Municipal Court of the City & County of San Francisco,* 387 U. S. 523, 528 (1967); *Schmerber* v. *California,* 384 U. S. 757, 767 (1966); *United States* v. *Mancusi,* 379 F. 2d 897, 903 (2d Cir. 1967), *aff'd,* 392 U. S. 364 (1968). The Amendment gives concrete expression to a right of the people which "is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). As such, this right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Stanford* v. *Texas,* 379 U. S. 476, 481 (1965); *Ker* v. *California,* 374 U. S. 23, 30 (1963); *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961).

Except in certain carefully defined classes of cases,[8] a search of a private dwelling without a warrant or proper consent is presumptively "unreasonable". *Katz* v. *United*

States, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 528-29; *Frank* v. *Maryland,* 359 U. S. 360, 380 (1959) (Douglas, J., dissenting); *Agnello* v. *United States,* 269 U. S. 20, 32 (1925). Therefore, the following issues present themselves for determination: (a) are the home visits required by the Department of Social Services in connection with the initial and continuing finding of eligibility "searches" within the meaning of the Fourth Amendment; (b) was the Fourth Amendment designed to protect plaintiff and the "class" she represents; and (c) assuming that (a) and (b) are answered in the affirmative, may the State condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the Fourth Amendment?

Upon oral argument, the Attorney General urged that home visits could not be considered a "search" within the meaning of the Fourth Amendment in that caseworkers are instructed not to enter the home of an applicant for or recipient of benefits "without permission by force, or under false pretenses, and not to make a search of the home by looking into closets and drawers.'" The Fourth Amendment, however, governs all intrusions by agents of the public upon personal privacy and security. *Terry* v. *Ohio,* 392 U. S. 1, 18 n. 15 (1968). Any unauthorized physical penetration into the premises occupied by plaintiff is a search. In view of the fact that recent cases have expanded the scope of the Amendment so as to eliminate the necessity for a finding of an actual physical trespass upon a constitutionally protected area, *Berger* v. *New York,* 388 U. S. 41, 50-53 (1967) and the cases cited therein, defendant's restrictive argument would appear frivolous. The zone of privacy created by the Amendment encompasses the "sanctity of a man's home and the privacies of life" and therefore must consist of something more than his

closets and drawers. *Boyd* v. *United States,* 116 U. S. 616, 630 (1886); see also *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965).

The Court in *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 530, found that while a routine inspection of the physical condition of private property was a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime, nevertheless the community interest in municipal fire, health and housing inspection programs was not superior to the important interests safeguarded by the Fourth Amendment's protection against official intrusion. We find this dispositive of the first issue presented and, accordingly, home visits must be considered "searches" within the meaning of the Fourth Amendment.

The guarantee of protection against unreasonable searches extends to the innocent and guilty alike. *McDonald* v. *United States,* 335 U. S. 451, 453 (1948); see also *Hoffa* v. *United States,* 385 U. S. 293 (1966), *rehearing denied,* 386 U. S. 940, 951 (1967); *Lewis* v. *United States,* 385 U. S. 206 (1966), *rehearing denied,* 386 U. S. 939 (1967). Like most of the Bill of Rights, the Fourth Amendment was not designed to be a shelter for criminals, but a basic protection for everyone. It reaches all, whether accused of crime or not. *Abel* v. *United States,* 362 U. S. 217, 254-56 (1960) (Brennan, J., dissenting); *Weeks* v. *United States,* 232 U. S. 383, 392 (1914). Since the most effective preventive against unlawful searches is the exclusion of their fruits from criminal evidence, this right must be upheld when asserted by those who transgress the law. But it cannot be inferred from this that the central thrust of the guarantee is to protect against a search for such evidence. "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with

the 'intent' of the invading officers." *Abel* v. *United States*, *supra* at 255. As Judge Prettyman argued in *District of Columbia* v. *Little*, 178 F. 2d 13, 16-17 (D. C. Cir. 1949), *aff'd on other grounds*, 339 U. S. 1 (1950):

> "[T]he common-law right of a man to privacy in his home . . . is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of crime has a right to protection against [the] search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

Judge Prettyman added that the Fourth Amendment applied to health inspectors as well as to police officers—indeed to every and any official of government seeking admission to any home.

> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."

Judge Prettyman's argument was first accepted by Mr. Justice Douglas in his dissent to the Opinion of the Court in *Frank* v. *Maryland, supra* at 377-78. Subsequently, *Frank* was overruled by *Camara,* wherein the Court approved Judge Prettyman's holding by finding that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. . . . [E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . ."[10]

Therefore, governmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity. *Abel* v. *United States, supra* at 254-56; *Iowa* v. *Union Asphalt & Roadoils, Inc.,* 281 F. Supp. 391, 408 (S. D. Iowa 1968). To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely "social problem". See *Verdugo* v. *United States,* 402 F. 2d 599, 611 n. 20 (9th Cir. 1968). Accordingly, plaintiff and the "class" she represents must be afforded the guarantees of the Fourth Amendment.

Even if we assume that AFDC grants are a privilege or governmental gratuity,[11] the power of government to decline to extend these benefits to its citizens "does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." *Parrish*

v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623, 630 (1967). For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right. *Thompson* v. *Shapiro*, 270 F. Supp. 331, 336 (D. Conn. 1967), *aff'd*, —— U. S. ——, 37 U.S.L.W. 4333 (1963). While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor. No showing merely of a rational relationship to some valid governmental policy will suffice. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Weiman* v. *Updegraff*, 344 U. S. 183, 191-92 (1952); *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 390 (1950); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). Nor will it suffice for the state to show merely that the public interest justifies the type of search in question. For the issue is not whether the public interest justifies home visits, but whether the initial or continued receipt of AFDC benefits can in consonance with the Constitution be made dependent upon the applicants' or recipients' submission to *warrantless* searches.[12]

The public interest may demand creation of a general exception to the Fourth Amendment's warrant requirement only when it can be demonstrated "that there are

available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit." *Parrish* v. *Civil Service Comm'n of the County of Alameda, supra.* Permissive legislative goals may not be pursued by means that significantly inhibit fundamental personal liberties when the end can be more narrowly achieved. *Elfbrandt* v. *Russell,* 384 U. S. 11, 18 (1966); *Shelton* v *Tucker,* 364 U. S. 479, 488 (1960). This Court cannot with deference to the Fourth Amendment excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative. *Terry* v. *Ohio, supra; Berger* v. *New York, supra* at 114 (White, J., dissenting); *McDonald* v. *United States, supra* at 456; see also *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Spevack* v. *Klein,* 385 U. S. 511 (1967). No such showing has been made herein.[13]

Less drastic means may be suggested for achieving the same basic purposes for which the City and State urge home visits are designed. Proof of actual residence may be ascertained, for example, by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission, in this instance, of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers. This is especially true since there is no assurance that the child will even be present when the home visit is made. Information regarding goods or services which the recipient may need in the management of her home can equally be obtained in the offices of the Department should the recipient wish to make her needs known there rather than in the convenience of her home. The regularity of school attendance, academic

achievement and information gathered from interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home.

Should any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of "probable cause", will test the particular decision to search against the constitutional mandate of reasonableness. Should this official determine that a valid public interest justifies the intrusion contemplated, then there exists probable cause to issue a suitably restricted search warrant. In this respect, it must be noted that the Court in *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 539, emphasized that "a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime." This would appear applicable to the instant proceedings.

As previously indicated, the Attorney General has suggested that it is not the purpose of the home visit to look for evidence of criminal activity. This Court, however, must take notice of Section 145 of the Social Welfare Law, which provides that:

> "Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which

case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of the person receiving public assistance or care to notify the public welfare official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall, upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official."* (Emphasis added.)

The Court in *People* v. *La Face,* 148 Misc. 238, 266 N.Y.S. 458 (Westchester County Ct. 1933) found that "the crime as defined under section 148 of the Public Welfare Law," a section substantially identical to Section 145 of the present Social Welfare Law,[14] "is not the consummation of fraud upon a particular department. The essence of the crime is the false representation in an application for relief. It makes no difference whether the relief is obtained or could have been obtained." The breadth of the interpretation given the fraud statute in *La Face,* coupled with the fact that this Court must assume that caseworkers will comply with the provisions of Section 145 by referring facts or evidence of welfare fraud gathered by them in the course of home visits to the appropriate prosecuting official, sustains the view that home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity.[15] As such, they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given.

Defendants argue further that plaintiffs must first exhaust available administrative remedies prior to seeking a federal forum. However, one of the purposes of the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343, is "to provide a remedy in the federal courts supplementary to any remedy any State might have." *McNeese* v. *Board of Educ.*, 373 U. S. 668, 672 (1963). Relief under the Civil Rights Act may not, therefore, be defeated for failure to exhaust available state administrative remedies. *Damico* v. *California*, 389 U. S. 416, 417 (1967); *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

The Court of Appeals for the Second Circuit in the recent decision in *The Colonnade Catering Corp.* v. *United States*, Docket No. 32817 (2d Cir., filed March 26, 1969) upheld a warrantless search by Internal Revenue Service agents of a catering establishment which held a New York State liquor license. In reversing the district court's order suppressing certain evidence seized, the Court of Appeals went to great lengths to distinguish *Camara* and *See* v. *City of Seattle*, 387 U. S. 541 (1967). The Court found that in contrast to the broad delegation of inspection power authorized in *Camara* and *See*, the statutory grants of inspection power under review were carefully defined and narrowed so that they granted "little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review." We find no such limitations upon the power of caseworkers to enter and search the homes of applicants for or recipients of public assistance. It is not sufficient that caseworkers are instructed not to enter by force or under false pretenses and not to look in closets and drawers.

Further, the Court of Appeals noted that "[d]ealers in liquor, *unlike homeowners* or businessmen conducting less specialized activities, are engaged in a heavily regulated

business," (emphasis added) and, therefore, as "sophisticated licensees . . . are undoubtedly acquainted with the limits upon the agent's inspection rights." No such presumptions may properly be made herein. Defendant's reliance on *Colonnade* is, therefore, misplaced.

Accordingly, we find that the City and State may not condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the Fourth Amendment. A contrary holding would threaten to "produce a result which the State could not command directly." *Speiser* v. *Randall, supra* at 526.

Doubtless there exists a pressing State interest in preventing such anti-social behavior as child abuse or neglect. But we see no reason why, in this respect, all families should not be treated alike. Specified procedures now exist under which the State can intervene in such circumstances to determine whether a child is neglected and, should such a finding be made, to regulate the neglected child's home or, if necessary, remove him from his home to insure that his needs are properly cared for.[16]

It is hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their "clients". However, when entry is barred, benefits may not be denied or terminated solely on this basis.

This Court recognizes the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved. Such efforts, however, must be, and clearly can be, conducted with due regard for the constitutional rights of welfare recipients. The laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure.

Appendix "B."

The oft-quoted protest of William Pitt would appear particularly, if not ironically, sound:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Plaintiffs' motion for a permanent injunction is granted. Submit order, on notice, in conformity herewith.

Dated: New York, New York, August 18, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J.

Appendix "B."

FOOTNOTES

[1] The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

[3] Memorandum of Law in Behalf of Dependant Wyman, dated June 26, 1969 at 5.

[4] *Id.* at 17.

[5] *Id.* at 26.

[6] *Supra* note 4.

[7] Memorandum of Law in Behalf of Defendant Wyman, *supra* note 3 at 31-32. By his affidavit of June 26, 1969, Leonard Bernikow, Assistant Corporation Counsel representing defendant Jack R. Goldberg, relies upon the brief submitted by the Attorney General for defendant George K. Wyman.

[8] As Mr. Justice Douglas noted in his dissent in *Frank* v. *Maryland*, 359 U. S. 360, 380 (1959):

> "We have emphasized over and over again that a search without a warrant can be made only in exceptional circumstances. If a house is on fire or if the police see a fugitive enter a building, entry without a search warrant can of course be made."

Additionally, under recently restricted circumstances, a warrantless search may be made as incident to a lawful arrest. *Chimel* v. *California*, —— U. S. ——, 37 U.S.L.W. 4613 (1969).

[9] Letter from Jack R. Goldberg to Lee A. Albert, April 11, 1969, Appendix A of Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary and Permanent Injunction.

[10] *Camara* v. *Municipal Court of the City & County of San Francisco*, 387 U. S. 523, 530-31 (1967).

[11] Recent scholarship has urged that the distinction between "rights" which are said to be vested and "privileges" which are said to be a mere government gratuity, be abolished. French, Comment: Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234, 236-39 (1961). Professor Charles Reich's theory of "entitlement" suggests that welfare benefits are no longer gratuities but have assumed at least some of the characteristics of "rights". Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245 (1965); Reich, The New Property, 73 Yale L. J. 733 (1964). See O'Neill, Unconstitutional Conditions: Welfare Benefits With Strings Attached, 54 Calif. L. Rev. 443 (1966).

[12] An analogy may be drawn between the listing of dependents on an income tax return and the listing of dependent children on applications for public assistance. Yet, could it be successfully argued that the right to obtain an income tax exemption for such dependents may lawfully be made dependent upon the taxpayer's consent to the warrantless entry into his home of Internal Revenue Service Agents?

[13] In this respect it should be noted that the Department of Health, Education and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." Dept. of HEW, Determination of Eligibility for Public Assistance Programs, 33 Fed. Reg. 17189 (1968).

[14] Section 148 of the Public Welfare Law provided:

> "Any fraud or false representation made by an applicant for relief, or by any person to secure relief for another person, or any wilful act designed to interfere with the proper administration of public relief and care, shall be deemed a misdemeanor."

[15] See also, in this context, 42 U.S.C. § 602(a)(16), (17), (18); N. Y. Penal Law §§ 155 *et seq.*; 18 NYCRR 347, 348, 351.1.

[16] Family Court Act Art. 3. (McKinney 1963).

Appendix "B."

McLEAN, D. J., dissenting

I am unable to agree with the court's conclusion in this case. We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law. To my mind it is unrealistic to regard this visit as a "search," and even more so to hold it to be an unreasonable search.

The court's opinion does not make clear what showing is to be made to obtain the warrant which the court considers necessary. If a warrant can issue only upon a showing of probable cause that the law has been violated, then the fundamental purpose of the program is ignored. Aid to dependent children becomes in effect another criminal statute. If, on the other hand, the welfare worker can obtain a warrant merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality. The need is evident. A welfare worker's time should not be wasted in elaborating the obvious. Reading leases (if in fact there are any), birth certificates, school records and the like, cannot be an adequate substitute for first-hand observation of living conditions in the home. What the warrant will do, in my opinion, is to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust.

Camara and *See* involved true searches. Those cases are distinguishable on their facts from this one. They do not

require the result which the court has reached here. The court has extended the doctrine of those cases in order to reach this result, thereby striking a damaging blow to the successful administration of this important social welfare program.

I would deny the motion and dismiss the action.

Dated: August 18, 1969

EDWARD C. McLEAN,
U.S.D.J.

Appendix "C"

Order for Permanent Injunction

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2281, for a permanent injunction enjoining defendants Wyman and Goldberg from denying, reducing or terminating public assistance to plaintiff and the class she represents, solely on the grounds of her refusal to consent to the entry into her home of welfare officials without a valid Search Warrant and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, it is

Ordered, adjudged and decreed that Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance, and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations are invalid and unconstitutional in so far as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits on the ground that the applicant therefor or the recipient thereof refuses to consent to home visits by welfare officials; and it is further

Ordered, adjudged and decreed that defendants, their successors in office, agents and employees and all persons in active concert or participation with them, are hereby enjoined from depriving otherwise eligible persons of Aid to Families with Dependent Chiildren benefits by reason of their refusal to freely consent to the entry of welfare officials into their dwelling places without a valid Search Warrant.

Appendix "C."

Dated: New York, New York, October 1, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J.

I DISSENT:

EDWARD C. McLEAN
U.S.D.J.

Appendix "D"

Section 134 of the New York Social Welfare Law provides:

"The public welfare officials responsible under the provisions of section one hundred thirty-two for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary. Persons receiving care in an institution shall be visited as often as may be necessary in order that any service or care needed by them shall be provided and in order that institutional care shall be given only as long as it is advantageous for the person's welfare. The circumstances of a person receiving continued care shall be reinvestigated as regularly as the rules of the board or regulations of the department may require."

Title 18 of the New York Code of Rules and Regulations:

"Section 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy . . ."

Appendix "D."

Section 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports . . ."

Section 175 of the Policies Governing the Administration of Public Assistance which provides, in pertinent part:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veterans Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child MAURICE JAMES, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 977

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

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REPLY BRIEF

Argument

The gravaman of appellee's motion to affirm, as it has been from the beginning, is an assertion of her own rights while paying little or no attention to the interests of her child in a meaningful implementation of the AFDC in-

tended for his benefit. Appellee insists that because a home visit by a case worker may result in criminal prosecution, it must be accompanied by all of the trappings of the criminal law. She tries to make this position tenable by asserting that there are "alternatives" to a home visit and that machinery exists in the State to protect a neglected child, once he has been neglected.

In relying on the existence of so-called alternatives to a home visit, appellee is, of course, acknowledging her obligation to furnish information, but is seeking to restrict to her own terms the means by which this information may be acquired. As we have demonstrated in our Jurisdictional Statement (pp. 18-19), this vaunted existence of alternatives is unrealistic. Even if it were true that the doctrine that the State must accomplish its ends by the least restrictive alternative applies to cases other than First Amendment cases (see *Struve, The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 Harv. L. Rev. 1463 [1967]), the exploration of such alternatives is a far more complex matter than that undertaken by the District Court or by appellee. No genuine exploration of alternatives was undertaken by the District Court, and, as we have said, the alternatives which it suggested are inadequate on their face. For example, the District Court relied on the availability of school records. Recent reports show that of the 600,000 in New York City alone on AFDC, about 450,000 were of school age and the remaining 150,000 were not. Thus, for those 150,000 children, the school record alternative is inapplicable (this also applies to the child in this case). Of the remaining children, many present a grave truancy problem for which attendance teachers often find that a visit to the home is necessary. See New York Times, February 2, 1970, pp. 1, col. 3-6, 38, col. 3. The suggestion by appellee that new provisions in the New York Family Law are ample protection for a child is erroneous. Those provisions deal with cases arising after harm has been done. The State is not required to await such an unhappy result, and indeed cannot.

The strange insistence that only the criminal law can adequately protect appellee once more ignores the interests of the child. It seeks to force a rigid procedure on what must necessarily be a flexible program and to require the exaction of criminal penalties for acts which, although they might possibly involve criminal sanction, are better handled outside that process for the benefit of everyone concerned.

Appellee is not being asked to choose between two constitutional rights. She is being asked for further necessary information to establish a statutory right belonging to her child. In this respect, reliance on *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), is misplaced. Indeed, the opinion in that case is in accord with the view presented by us that if questioning is deemed coercive, any evidence could not be used in any criminal proceedings (Jurisdictonal Statement, pp. 21-22).

CONCLUSION

This Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, February 16, 1970.

Respectfully submitted,

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OCTOBER TERM, 1969

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WYMAN

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT WYMAN

Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court (A. 27-31), dated June 13, 1969, is reported at 302 F. Supp. 478. The ma-

jority and dissenting opinions of the three-judge court (A. 119-137), dated August 18, 1969, are reported at 303 F. Supp. 935. There were no separate findings of fact and conclusions of law.

Jurisdiction

The judgment and order of the District Court were entered on October 1, 1969 (A. 137-138). The notice of appeal was filed on October 24, 1969 (A. 139). The jurisdictional statement was filed on December 20, 1969. This Court noted probable jurisdiction on February 24, 1970.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Constitutional Provisions and Statutes and Regulations Involved

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York Social Services Law, § 134, provides:

> "The public welfare officials responsible under the provisions of section one hundred thirty-two for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that as-

sistance or care may be given only in such amount and as long as necessary. Persons receiving care in an institution shall be visited as often as may be necessary in order that any service or care needed by them shall be provided and in order that institutional care shall be given only as long as it is advantageous for the person's welfare. The circumstances of a person receiving continued care shall be reinvestigated as regularly as the rules of the board or regulations of the department may require."

Title 18 of the New York Code of Rules and Regulations (hereinafter N.Y.C.R.R.) provides in pertinent part:

"Section 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy . . ."

"Section 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports . . ."

Section 175 of the Policies Governing the Administration of Public Assistance provides in pertinent part:

"Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veterans Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

Questions Presented

1. Is the claim that a required home visit by a caseworker to a recipient of Aid to Families with Dependent Children assistance violates the Fourth Amendment prohibition against "unreasonable searches and seizures" to be tested by whether such a visit serves a compelling state interest?

2. Does the requirement that initial and periodic visits be made by caseworkers to the homes of applicants for and recipients of Aid to Families with Dependent Children assistance violate any constitutionally protected right of privacy?

3. Does the denial or termination of assistance, after a hearing, to an AFDC applicant or recipient who refuses to consent to a home visit place an impermissible burden on any Fourth or Fifth Amendment rights of the client?

4. Does the Constitution require a caseworker to secure a search warrant in order to make a home visit to an AFDC client?

5. Did the District Court properly grant plenary declaratory and injunctive relief without requiring resort to a state forum and without hearing any evidence?

Statement of the Case

Appellee claimed below that her continued receipt of Aid to Families with Dependent Children assistance (hereinafter AFDC) could not be made to depend upon her consenting to periodic statutory home visits by local agency caseworkers because such visits, if she does not want them, violate her right to be free from unreasonable searches and seizures and her right of privacy.

a. The Complaint

Appellee receives assistance under the New York AFDC program on behalf of herself and her minor son. According to the complaint, there is no income or source of support for either appellee or her son except this assistance (A. 6).*

On May 8, 1969, a caseworker in the New York City Department of Social Services, wrote to appellee requesting an appointment to make a recertification visit on May 14, 1969. In reply, appellee contacted the caseworker and told her that, although she would be willing to supply any information that was "reasonable and relevant" to her need, any such discussion must take place, not in her home, but, rather, in the offices of the Social Services Department. The complaint alleged that the caseworker explained to appellee that regulations required a home visit and that her refusal to permit such a visit could result in termination of her welfare benefits. Appellee continued to refuse permission for a home visit (A. 8-9).

The only reason given in the complaint for the refusal to consent to another home visit was that, on previous visits to appellee "and, on information and belief [to the homes], of all other persons similarly situated, questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligiblity" (A. 9).

On May 13, 1969, the appellee was notified of the intention of the Department of Social Services to discontinue

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*Appellee first applied and was accepted for assistance shortly before the birth of her son in May, 1967. At that time she was unable to contnue her job and was going on maternity leave. After a home visit, it was felt by the caseworker that the case should be opened although appellee had not satisfactorily explained her ability to manage her rent on the salary she had been receiving (Exh. I, annexed to appellant Wyman's answer [appellee's case history with the New York City Department of Social Services] [hereinafter Exh. 1] Intake Interview, 4/27/67).

assistance because of her refusal to permit a home visit by her caseworker for purposes of recertifying her as eligible for AFDC benefits. On May 27, 1969 a "prior review" hearing was held at which plaintiff and her attorney once more refused to allow a caseworker into the home and termination of benefits was directed on June 2, 1969 (A. 9).

b. Relief Sought

Claiming that her factual allegations established the violation of rights secured to her by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* and §§ 1381 *et seq.* and the regulations promulgated thereunder, appellee brought this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3), (4), 2201, 2202.

The complaint sought the convening of a three-judge court, a temporary restraining order and a preliminary injunction ordering appellees restored to the assistance to which they and the class they represent were entitled and ordering that the policy at issue not be enforced during the litigation. It sought a judgment declaring that the "policies and practices complained of" were unconstitutional; that welfare officials could not "discontinue, or reduce financial assistance, or otherwise interfere with the receipt of such assistance" because of the recipient's refusal to consent to entry without a search warrant; that there could not be a threat to take such action, that no consent could be deemed freely given unless the recipient were told that failure to consent could result in termination, reduction or interference with benefits; and, that there could be no entry or search of any rooms and no touching or examination of any objects except pursuant to a search warrant or on the basis of free consent after a warning that no adverse consequences could result from a refusal to consent (A. 11-12).

The complaint also asked for a permanent injunction restraining entry into homes without search warrants or consent and restraining "[i]nterrogating or questioning an applicant for or recipient of public assistance regarding activities not demonstrably relevant to issues of eligibility" (A. 12).

The order to show cause requested a preliminary and permanent injunction restraining the defendants from entering the home of plaintiff and others similarly situated without either a warrant "issued upon probable cause" or the freely given consent of the recipient after a warning that he need not consent; the convening of a statutory three-judge court; a class action order pursuant to Federal Rules of Civil Procedure, Rules 23(a), (b)(2); and, a temporary restraining order preventing the discontinuance of aid to the named plaintiff because of her refusal to consent to a home visit (A. 19-21).

c. Procedural History of the Case—June 6, 1969-June 26, 1969; The Decision and Order

This action was begun by summons and complaint brought on by order to show cause served on the office of the attorney for appellant on Friday, June 6, 1969. The case was assigned to an attorney on Monday, June 9, 1969. The order to show cause was returnable at 10 a.m. on Tuesday, June 10, 1969. On that date, appellant was given until June 13, 1969 to file a memorandum of law with respect to the need for a three-judge court and a temporary restraining order in behalf of Mrs. James.

On June 13, the memorandum was filed and, on that very day, the District Judge, the Honorable Charles Tenney, issued a written opinion holding that "the recent decisions in *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* [394 U. S. 618]; *King* v. *Smith*, 392 U. S. 309 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *McDonald* v. *United States*, 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 260,

425 P. 2d 223, 57 Cal. Rptr. 623 (1967), necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein" (A. 29).

Disregarding the more limited request of the order to show cause, the court went on to issue a temporary restraining order with respect to "all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes" since denial or termination of aid to them in the event of refusal would cause irreparable injury "both clear and abundant, while the cost to the State and City is obscure and minimal" (A. 29-30). The temporary restraining order contained the warning provision sought by appellee only in the preliminary and permanent injunctions (A. 32-33).

Finally, the single district judge, notwithstanding appellant's argument that such a finding should be made only by the three-judge court, determined that the action "may properly proceed as a class action pursuant to Fed. R. Civ. P. 23" (A. 30).

The three-judge court was designated the following week. In addition to Judge Tenney, the Court consisted of Circuit Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit and District Judge Edward C. McLean of the United States District Court for the Southern District of New York. Appellee was given until June 23, 1969 to file her papers. Appellant was required to reply by June 26, 1969. Oral argument was set for June 30, 1969.

d. The Opinion Below

On August 18, 1969, the Court, Judge McLean dissenting, rendered its written opinion holding the state policy

unconstitutional. The majority opinion, written by Judge Tenney, started from the fundamental proposition that "[t]he overriding function and basic purpose of this Amendment [the Fourth] is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials," and moved on to the assertion that "a search without a warrant or proper consent is presumptively 'unreasonable'" (A. 122). On this analysis, Judge Tenney viewed the issues as being whether required home visits are searches within the meaning of the Fourth Amendment; whether the Fourth Amendment was designed to protect appellee and her class; and, if both questions were answered in the affirmative, whether the State of New York could condition AFDC benefits on a "waiver of rights embodied in the Fourth Amendment" (A. 123).

After characterizing as "frivolous" (A. 123) any contention that home visits were not searches within the meaning of the Fourth Amendment and pointing out that "[t]he guarantee of protection against unreasonable searches extends to the innocent and guilty alike" (A. 124) and is not limited to a protection against the search for evidence of crime, the majority stated that:

> "[G]overnmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity . . . To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely 'social problem'." (A. 126)

The majority thus reached the conclusion that appellee was entitled to "the guarantees of the Fourth Amendment" and added that the characterization of AFDC grants as a privilege did not mean that such grants could be conditioned on the relinquishment of a constitutional right (A. 126).

The reality of the problems inherent in its position was briefly noted and quickly disregarded by the majority opinion:

> "While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor." (A. 127)

Relying exclusively on a series of First Amendment cases, Judge Tenney stated that it was not sufficient to show "a rational relationship to some valid governmental policy" nor to show "merely that the public interest justifies the type of search in question" (A. 127).

It was the majority opinion that there could be no general exception to the constitutional warrant requirement where the public interest could be preserved and "[p]ermissive [*sic*] legislative goals" achieved by means "more narrowly" designed (A. 127-128). The majority went on to propose a series of "[L]ess drastic means for achieving the same basic purposes for which the City and State

urge home visits are designed" (A. 128). The Court, thus, viewed a duly-executed lease as proof of actual residence, birth certificates as proof of family composition, the availability of medical facilities as adequate to ascertain the well-being of the child, and the availability of information about goods and services in the offices of the Department "should the recipient wish to make her needs known there" as adequate to determine those needs. Finally, the Court found that "[t]he regularity of school attendance, academic achievement and information gathered from the interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home" (A. 128). Maurice James, the child of appellee, was, at the time, two years old.

In the opinion of the majority, if "any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case", an application may be made for a search warrant based on probable cause within the meaning of *Camara* v. *Municipal Court*, 387 U. S. 530, and "a suitably restricted search warrant" could issue (A. 128-129).

The majority was also of the view that the home visit could be construed as designed to obtain evidence of criminal activity since New York Social Welfare Law, § 145 requires welfare officials to provide any information it obtains of such activity to prosecuting authorities and since, in 1933, the County Court of Westchester County purportedly gave the law a broad interpretation. *People* v. *LaFace*, 148 Misc. 238, 266 N.Y.S. 458. Because "home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity . . . they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given" (A. 130).

Finally, the Court acknowledged that, "[T]here exists a pressing State interest in preventing such anti-social

behavior as child abuse or neglect"; it recognized "the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved" and it "hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their 'clients'." It concluded, however, that "[t]he laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure" (A. 132).

Judge McLean dissented, stating first:

> "We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law." (A. 136)

Dealing next with the new warrant requirement, Judge McLean pointed out that the majority had left unclear the showing necessary to obtain a warrant but that, if the showing required was probable cause that the law had been violated, "the fundamental purpose of the program is ignored" and if a warrant could be obtained "merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality" (A. 136). Judge McLean said that reading records, if they were available, "cannot be an adequate substitute for first-hand observations of living conditions in the home" (A. 136). He thought that the only result of a warrant procedure would be "to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship

which can be effective only when it is based upon mutual confidence and trust" (A. 136).

Judge McLean viewed the *Camara* and *See* cases as distinguishable on their facts and concluded that the majority's extension of those cases to the instant case was "striking a damaging blow to the successful administration of this important social welfare program" (A. 137).

Despite the short time which the parties had had to prepare the case, despite the offer to produce additional material made by appellant at oral argument, despite the fact that appellant's memorandum of law was limited only to the question of a preliminary injunction and despite the fact that issue had been joined by the answers to the complaint, the District Court granted declaratory relief and a permanent injunction (A. 137-138).

Summary of Argument

Although a home visit by a caseworker to a recipient of AFDC assistance is subject only to reasonableness standard stated by the Fourth Amendment, the home visit, in fact, serves a host of compelling State interests. It serves to verify that all of the criteria of eligibility for assistance are met and to insure that funds are allocated only to eligible people and in the amounts necessary. It serves to insure that the welfare of the child is being safeguarded. As such, it applies to applicants for assistance, recipients of assistance and may be necessary to verify a request for a special grant.

Indeed, the home visit is a validation tool required by the federal government under the present AFDC program for a selected sample of cases. It is part of the full field review being used to test the new Simplified Eligibility System in selected projects around the country. It was one of the procedures used in the recent study of the AFDC program in New York City.

The State has scrupulously guarded against any abuse in the home visit by provisions that it be made periodically, that it be made at specified times of day and that it not be extended to any closed areas.

There are yet no viable alternatives to the home visit despite the finding of the District Court to the contrary.

Termination of assistance by virtue of a refusal to permit a home visit is not an impermissible burden on the right of privacy since such a visit is reasonable in the first place. In this respect, the Fourth Amendment right of privacy differs from the Fifth Amendment privilege against self-incriminaton because, unlike the right of privacy, the latter privilege may not be abridged, it may only be replaced by a co-extensive immunity. By contrast, the Fourth Amendment does not prohibit searches and seizures but only "unreasonable searches and seizures."

The remote possibility of criminal prosecution in the case of a home visit should not serve to bring this case within the aegis of the criminal law and to limit the State's methods for insuring a fair distribution of available funds to the harsh sanction of a criminal prosecution. It is not the purpose of the home visit to look for evidence of criminal activity and the speculative possibility that such material could be discovered may be satisfied, if necessary, by a simple exclusionary rule. Appellee may not assert a right to withhold information on the basis of such a possibility where she herself acknowledges the undeniable fact that she had a duty to provide information with respect to her eligibility.

Nor is a search warrant required to make a home visit. The insistence by the District Court that such warrants be obtained would produce the anomalous result that the agency to whom the applicant has applied for assistance must obtain a warrant to verify eligibility for future payments of public funds. Thus, the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530 is inapplicable. Furthermore, the case involved a search for violations and

was directed to a specific factor which can readily be isolated in a warrant. A warrant is not necessary to inform the applicant or recipient of the purpose of the home visit here, its scope or the authority of the person making the visit. Indeed, it would be inimical to the successful administration of the AFDC program which depends on a one-to-one relationship between caseworker and client. In addition, no standards are established by the District Court governing the requirements for the issuance of such a "warrant."

Finally, the case was not in a proper posture to be finally adjudicated by the District Court. The Court did not require appellee to present her complaints to the appropriate State forum even though she had initiated available state procedures which she abandoned mid-stream for the District Court.

At the very least, a trial should have been held as to whether or not the alternatives which the District Court on its position found a substitute for a home visit were actually practicable and adequate.

POINT I

A required home visit, by appointment, to an applicant or recipient of AFDC assistance is not an unreasonable intrusion on any constitutionally protected right of privacy.

Appellee, a recipient of AFDC benefits in New York, began this action after she refused to permit, by appointment a week in advance, a periodic visit to her home by a local Social Services caseworker in order to establish her eligibilty for continued assistance. As a result of this refusal, assistance to her was terminated after a hearing.*

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* The hearing was held by the New York City Department of Social Services (A. 16-18). Appellee abandoned her right to a State hearing and commenced the instant action.

Appellee claimed below that a required home visit unconstitutionally forces her to sacrifice her right of privacy. Her stated objection to permitting a home visit, even one made by appointment, was that during such visits questions are asked which she feels are not relevant to her eligibility or which are too personal in nature. She did not claim that the visit represents a search or inspection of her premises in any commonly understood sense. She simply does not wish to conduct an interview in her home. Paradoxically, she stated her willingness to provide all relevant information outside her home. No explanation was offered as to why questions asked outside the home are less objectionable than questions asked inside the home and no example was given of any objectionable question.

The District Court, in concluding that no home visit could be made over objection except under the authority of a "suitably restricted" search warrant (A. 129), completely ignored this sole stated basis for the complaint. Nor did the Court rely either on the full panoply of constitutional amendments suggested by appellee (*supra*, p. 6), or on the "penumbral right of privacy and repose" suggested in the opinion convening the three-judge court (A. 29). The Court relied only on the Fourth Amendment (and, by implication, on the Fifth) as made applicable to the States by the Fourteenth Amendment.

A. A claimed violation of the Fourth Amendment is to be judged by whether or not the challenged action is reasonable within the meaning of that Amendment.

The standard employed by the District Court in assessing appellee's Fourth Amendment claim flies in the face of the language of the Amendment itself. Essentially, the Court held that the home visit without a warrant is an invasion of privacy which the State must show it has a "compelling interest" in making. However, the Fourth Amendment is one of the provisions of the Bill of Rights

with its own standard for judging whether or not it has been violated:

> "The right of the people to be secure in their persons houses, papers and effects, against *unreasonable* searches and seizures, shall not be violated. . . ." U. S. Const. amend. IV (Emphasis supplied).

It is only unreasonable searches which the Constitution forbids. *Desist* v. *United States,* 394 U. S. 244, 254 n. 23, *Terry* v. *Ohio,* 392 U. S. 1, 9. Concomitantly, a search which is not unreasonable does not violate the Fourth Amendment and no further interest in making it, compelling or otherwise, must be shown.

The Fourth Amendment immunity from search and seizure is not "a virtually unconditional personal right" which can be infringed only on a showing of compelling need. *Shapiro* v. *Thompson,* 394 U. S. 618, 643-44 (concurring opinion of Mr. Justice STEWART). It is a right which, by definition, must bow to reasonableness. By contrast, for example, First Amendment rights are "virtually unconditional" as written and so can be overcome only by a compelling State need. The Fifth Amendment privilege against self-incrimination may not be overcome by any showing. It may only be replaced by an immunity coextensive with the privilege. Whereas a compelling state interest inquiry implies a finding that a virtually unconditional right has been abridged, in Fourth Amendment cases such an inquiry is self-contradictory. The inquiry is not whether a State has a compelling interest in making unreasonable searches. The inquiry is solely whether the search it made was reasonable. If it was, no right has been violated.

Any suggestion that a "penumbral right of privacy and repose" elevates the standard by which the home visit is to be judged is untenable. While several amendments

directly protect or have auras of privacy which surround the explicit right which is the subject of the provision (e.g., First Amendment right of free association; Third Amendment quartering of troops in peacetime; Fifth Amendment privilege against self-incrimination), any claimed violation of privacy must be related to a specific "command of the United States Constitution." *Katz* v. *United States*, 389 U. S. 347, 350.* The peripheral right of privacy is, thus, to be measured by the same standard as the provision from which it derives.

The Fourth Amendment right of privacy is not denigrated because of the standard by which it is measured. The standard simply reflects the reality that, in a society, the individual may not wholly insulate himself. "Virtually every governmental action interferes with personal privacy to some degree." *Katz* v. *United States, supra* at 350. But governmental action cannot always be invalidated. Thus, unless an absolute right is involved, we must look to see whether the action is reasonable. See *Dandridge* v. *Williams*, —— U. S. ——, 38 U.S.L. Week 4277, 4281 (April 6, 1970).

The significance of this principle for the instant case lies not so much in whether or not the home visit can withstand a "compelling interest" test, which it can, but lies, rather, in the fact that, once an appropriate analysis is employed, the inappositeness of the District Court's "less drastic means" test (*infra*, pp. 29-31) and the inaccuracy of its "unconstitutional burden" holding (*infra*, pp. 32-33) become manifest. Moreover, the confusion generated by the sudden change in standard wrought by the Court below makes the issue significant even apart from this case.

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* The only exception to this principle is found in *Griswold* v. *Connecticut*, 381 U. S. 479. The right of privacy in that case is in no sense analogous to the right asserted here, and is, essentially, a fundamental human right.

B. A required periodic home visit by a caseworker to an AFDC recipient is reasonable within the meaning of the Fourth Amendment.

Any proper assessment of a Fourth Amendment claim must take account of "the reasonableness in all the circumstances of the particular governmental invasion . . ." *Terry* v. *Ohio, supra* at 19. The "specific content and incidents" of the right of personal security protected by the Fourth Amendment "must be shaped by the context in which it is asserted" (*Id.* at 9). For appellee, only one element shapes the context of this case—the fact that an interview with respect to her eligibility for AFDC assistance is to be conducted in her home. No other circumstance is accorded relevance. No weight is assigned to the circumstances which make such an interview necessary or to the conditions under which it is made. However, neither the purpose nor the conditions of such interviews can be disregarded. The home visit must be viewed in light of the purposes of the AFDC program in general, the broad and close relationship between agency and client, the relationship of the home visit to the objectives of the program and the protections under which the visit is made.

The required home visit is an aid in determining eligibility for AFDC assistance. It is a means of assuring that funds are allocated only to persons who are eligible for them, that they are allocated to the extent to which they are necessary and that they are used for the purpose for which they are allocated—the welfare of the dependent child in his home. 42 U.S.C. § 605.

The entire focus of the AFDC program is the child in the home. *Dandridge* v. *Williams, supra* at 4279. It was the judgment of both Congress and the New York State Legislature that children of parents with inadequate resources for their upbringing are, nevertheless, best cared for in their own homes rather than in institutions where at all possible. To effectuate this end both the children

and their parents or guardians require assistance. 42 U.S.C. § 601. However, the program is thwarted if the money is not needed or is not being used for the benefit of the children.

Accordingly, the law presently requires investigation of the factors of eligibility of AFDC applicants and recipients. Appellee has never disputed the reasonableness of some investigation. Nor could she. *Cf. Shapiro* v. *Thompson, supra* at 636. See also, *Hannah* v. *Larche*, 363 U. S. 420, 448-49. She has never directly asserted that her home is not relevant to such an inquiry. However, her opposition to a home visit must mean either that she considers her home irrelevant or that the agency in charge of administering funds must accept her version of the relevant factors in her home. Neither of these propositions is accurate.

The relevance of the home to the proper administration of the AFDC program is amply expressed in the applicable statutes and regulations. 42 U.S.C. § 602(d)(14) requires that a state plan must provide programs geared to:

> "the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative and individual to attain or retain capability for self-support and care and to foster child development."

Cf. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 3452(10), dealing with foster care, which requires the assessment of "total parental functioning and home conditions upon the child."

New York State has adopted the federal policy. See N. Y. Social Services Law, §§ 348-350; 353-354. 18 N.Y.C.R.R. § 369.2(c) provides:

> "(c) *Welfare of child or minor.* A child or minor shall be considered to be eligible for ADC if his home situation is one in which his physical, mental and

moral well-being will be safeguarded and his religious faith preserved and protected. (1) In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation. Where appropriate, consultation or direct service shall be requested from child welfare."

The continuing interest in the well-being of the child requires that:

"The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility. . . ." 18 N.Y.C.R.R. § 369.4(b)(1).

Where the law makes it perfectly clear that the home situation is the critical factor; it is completely unrealistic to hold that the home may not be visited by appropriate personnel or that there are adequate alternatives to such a visit.

The services aspect of the home visit has been described as follows:

"An agency may provide recipients with a list of services available, but the recipient may not be aware or willing to acknowledge his need of a particular service, or for some reason may not request it. On the other hand, an alert and interested worker in a home visit may identify needs for which the agency may offer help, e.g. need for more adequate furnishings . . . or for repair of or removal from unsafe

> conditions . . . Help can be offered to improve housekeeping or child care though service might never be requested." (A. 70, Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York.)

Child protective services are not optional with the parent where the welfare of the child may be jeopardized. The AFDC child is peculiarly susceptible to the hazards of life, to neglect and even abuse, not necessarily for want of love, but for want of means. He is, by definition, a one-parent child and may be one of several children in the family (See A. 33-56). The amount allocated for his care admits of no leeway in expenditure; the available housing is scarcely first-rate; there is no money available for baby sitters. These are built-in factors for the creation of serious physical and emotional problems. Thus, the recently much discussed problems of child neglect and abuse are inherently more prevalent in assistance households, a fact recognized by federal authorities. *Advisory Council Report, U. S. Dept. of Health, Education and Welfare; Welfare Administration, Bureau of Family Services,* April, 1963.

It is essential, therefore, that a continuing evaluation be made so that "the amount, nature and manner of providing assistance be determined with due regard to the conditions existing in each case." (Affidavit of Eleanor Walsh, *supra,* A. 69). It would, in this case, for example, be absolutely essential to verify appellee's statement that there were rats in her apartment (Exh. 1, 10/9/67), particularly where appellee indicated that she had done nothing about the alleged problem. It would also be essential to see a child who, in the first year of his life, was in the hospital two times (Exh. 1, 7/20/67) including once with a skull fracture and who was treated for, among other things, a "dent and bump on his forehead" (Exh. 1,

2/19/68, 4/19/68). The worker, who would also be concerned about the child's relationship with his mother (Exh. 1, 7/26/67), observing the child in his home, was able to report him "healthy" (Exh. 1, 5/7/68, 12/26/68).

The home visit also serves to verify more objective eligibility criteria. See 18 N.Y.C.R.R. § 351.2. It verifies actual residence at the address provided, family composition and need and its extent. Even those factors are "variables" (18 N.Y.C.R.R. § 351.23), which it is reasonable periodically to redetermine. Indeed, appellee has never satisfactorily established her initial eligibility for assistance (Exh. 1, 5/2/67, 6/28/68) and she has a serious money management problem (Exh. 1, 12/20/68).

The extent of need has become still more difficult to verify if the State of New York is returned to a system of providing special grants for individual items or if a family budget must be calculated on an itemized basis. See *Rosado* v. *Wyman*, —— U. S. ——, 38 U.S.L. Week 4266 (April 6, 1970). Visual verification of need for a requested item may be the only sure way to avoid misallocation. The record in this case is rife with such potential examples. Thus, appellee requested a new crib mattress, the need for which could not be verified (Exh. 1, 8/14/67), a new bed, which she did not need (Exh. 1, 3/7/68, 5/15/68), new furniture, which she did not need (Exh. 1, 5/1/68, 5/7/68), and linoleum, the need for which was verified (Exh. 1, 8/14/67).

The federal government requires verification of eligibility in a selected sample of cases. This Quality Control procedure is to include home visits. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part II, § 6200 (a) (3). The State of New York has promulgated regulations pursuant to N. Y. Social Services Law, § 134, requiring that initial eligibility must be determined by a home visit (18 N.Y.C.R.R. § 351.10) and that the required recertifica-

tion every three months must be determined by an interview or a home visit (18 N.Y.C.R.R. § 351.21).*

C. A system of accepting a client's declared need for assistance does not undermine the necessity for home visits.

Appellee's implied position that her own declaration of need is sufficient to establish eligibility for AFDC assistance for herself and her child is presently the subject of a nationwide experiment. Ironically, this program does not support her position. SRS Program Regulation 10-3 (45 CFR Ch. 2, § 205.20) requires the States to establish a program in selected areas for a "Simplified Method for Determination of Eligibility":

> "The simplified method means an organized method by which the agency accepts the statements of the applicant for, or recipient of assistance, about facts that are within his knowledge and competence (all facts except those specified in paragraph (a)(3) of this section as a basis for decisions regarding his eli-

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* Many States require home visits for initial and some for continuing eligibility for AFDC benefits. See *e.g.*, Ark. Stat. 83-131 (1968); Ala., Manual for Administration of Public Assistance, Part I-8 (B) (1968 rev.); Ariz., Regulations promulgated pursuant to Revised Statute § 46-203, Reg. 3-203.6 (1968); Cal. State Dept. of Social Welfare Handbook, C-012.50 (1964); Colo. ch. 119, Art. 9, C.R.S. 1963 (1967 Supp.), as amended ch. 279 Session Laws, 1969; Fla. Public Assistance ch. 100; Ga. Division of Social Administration—Public Assistance Manual, Part III, Sec. V (D)(2), Part VIII (A)(1)(b) (1969); Ill. Stat. Public Aid Code 23 §§ 4-7; Ind. Stat. 52-1247, Dept. Pub. Welfare, Rules and Regs., Reg. 2-403 (1965); Mich. Public Assistance Manual, Item 243 (3)(F) (Rev.) 1967); Miss. Code 1942 § 7177 (Laws of 1940 ch. 294); Mo. Public Assistance Manual, Dept. of Welfare, Sec. III (1969); Nebraska, State Plan and Manual Regulations, Part IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, Part II, §§ 2120, 2122 (1969); N. M. Public Welfare Act, 13-1-13, Health and Social Services Department Manual, §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV(D)(2); S. Dak. L. 1967, 28-7-7 (formerly SDC 1960 Supp. 55.3805); Tenn. Code Ann. 14-301 *et seq.* 37-309, Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wisc. Public Assistance Law Sec. 49.19(2).

gibility and extent of entitlement." 45 CFR § 205.20 (c)(1).

45 CFR § 205.20(a)(3) provides that:

> "When under the simplified method, statements of the applicant or recipient are incomplete, unclear, or inconsistent, or where other circumstances in the particular care indicate to a prudent person that further inquiry should be made, and the individual cannot clarify the situation, the State agency will be required to obtain additional substantiation or verification."

Should the experiment prove feasible, it will be implemented on a nationwide basis. At present, reports from the experimental projects must be presented to the Secretary of Health, Education and Welfare by July 1, 1970 and his decision with respect to such implementation will be forthcoming at some time after that.

In neither its experimental nor its ultimate form is the simplified eligibility method to go untested. The regulation provides for:

> "Validation which relates to the procedures adopted in the initial testing of the correctness of the eligibility decisions. The validation process consists of a full field review of samples of local agency case actions made under the simplified method, to determine how reliable the entire method is in actual operation."

The full field investigation:

> "is required for all cases included in the sample. *The investigation will include a home visit with the client* (and members of the client group, insofar as necessary) regardless of whether the local agency itself conducted a field investigation. Appointments for the home visit may be made." THE SIMPLIFIED METHOD FOR DETERMINATION OF ELIGIBILITY, SRS PROGRAM REGULATION 10-3, IMPLEMENTATION GUIDES FOR

STATE AGENCIES, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, ASSISTANCE ADMINISTRATON (March 10, 1969) (Hereinafter IMPLEMENTATION GUIDES) p. 48 (Emphasis supplied).

Moreover, "[t]he agency, in carrying out the 'full field review' required of it to validate the Simplified Method, must document or otherwise substantiate *all* factors of eligibility on a selected sample of cases (Emphasis in original). At the time he completes and signed the simplified form the applicant or recipient, therefore, *must agree to this full field investigation in the event his or her case is selected for review*" (Emphasis supplied). IMPLEMENTATION GUIDES, Draft Guide No. 1 (Addendum) (b) (June 19, 1969), p. 2.

The Quality Control System for validating eligibility should the experimental system become permanent has not yet been devised. IMPLEMENTATION GUIDES, *supra*, p. 36. There is, however, no reason to believe that it will not include home visits to a selected sample of cases.

In short, whatever program for eligibility exists, it must be validated. The home visit is one of the time-tested methods for accomplishing that validation. It is used under the present federal Quality Control System. It is used in validating the experimental simplified eligibility system. Significantly, it was used in the recent study of the New York City AFDC program by state and federal authorities. See COMMITTEE ON WAYS AND MEANS, U. S. HOUSE OF REPRESENTATIVES, *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), p. 5 (Hereinafter *Report of Findings of Special Review*).

It is of no constitutional significance that these programs use the home visit in a sample of cases while New York presently uses it for all cases. The question is whether the home visit may be conducted at all. If it is

permissible, then its scope is one for legislative determination. Moreover, even in sample cases, the home visit cannot be at the discretion of the applicant or recipient. Such an option would effectively destroy the validity of the findings of the accuracy of eligibility determinations. See IMPLEMENTATION GUIDES, Draft Guide No. 1 (Addendum) (b), *supra.*

One additional factor should be noted. As a part of the simplified program for determining eligibility, New York is also experimenting with a complete separation of the income maintenance and social services aspects of the AFDC program. See *Implementation Guides, supra,* p. 99; STATE OF NEW YORK, DEPARTMENT OF SOCIAL SERVICES, *The New Experimental Systems Design for Delivering Income Maintenance and Social Services* (May, 1969). This aspect of the program involves a separation of staff functions, designed, *inter alia,* to free caseworkers for more intensive social services work. This would include home visits for service purposes. While many services would be optional, protective services for the child would not (*Id.* p. 3).

It cannot be known with any certainty the extent to which the home visit acts as a deterrent to abuse, the extent to which an AFDC client can assess his own needs in terms of available resources or the impact various aspects of the new experimental programs will have on the ultimate design of those programs. However, any new constitutional rule dealing with home visits may well prove premature.

D. The home visit is made with the utmost concern for the dignity of the applicant or recipient.

Not only is the home visit directly interwoven with important, indeed, compelling, governmental objectives, but scrupulous care is taken to see that it is not abused. Federal, State and local regulations mandate that "[t]he policies and procedures for taking applications and determining eligibility for assistance or other services . . .

will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights." HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2200 (a) (H. T. No. 139, Feb. 8, 1968); 18 N.Y.C.R.R. § 351.7. See also Informational No. 67-41 New York City Department of Social Services, July 3, 1967 (Record on Appeal, Document No. 15, Appendix "B").

This directive has several aspects. It means first, that the applicant or recipient is the "primary source" of information about his eligibility. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2220 (e) (1); 18 N.Y.C.R.R. § 351.6. Obviously a client's home is a part of that. It means, next, that "collateral contacts" shall not be made without the consent or knowledge of the applicant or recipient. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2300 (e) (2); 18 N.Y.C.R.R. § 351.7. Collateral contacts include seeking information from "social agencies, doctors, hospitals, and similar resources, or . . . relatives or other individuals" (*Id.*). They also include schools. 18 N.Y.C.R.R. § 351.6.

Finally, this policy protects a client from an agency worker:

> "entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers or papers, to seek clues to possible deception." HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 2300 (a); N. Y. City Informational No. 91b, *supra;* See 18 N.Y.C.R.R. § 351.1 (d).

The home visit is, thus, circumscribed to strike a balance between the legitimate interests of the agency and

the right of privacy of the individual. Significantly, appellee, here, does not maintain that any one of these restrictions on the home visit was violated at any visit to her home. She does not express any fear that such violations will occur in the future. Moreover, the visit which she did refuse was sought to be made by appointment a week in advance. Thus, the only sacrifice of her privacy which she was required to make was the admission of the caseworker which, as we have said, is closely related to determining her eligibility. Clearly, that visit, then, is wholly reasonable. Contrast *Parrish* v. *Civil Service Commissioner of the County of Alameda*, 66 Cal. 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967) (midnight raids to determine fraud by violation of the "man in the house" rule).

E. No alternative method is a complete substitute for the home visit.

Despite the relationship of the home visit to the determination of the factors of eligibility, the District Court found the visit unreasonable because its objectives can be met by "[l]ess drastic means" (A. 128).

In the first place, this "less restrictive alternative" theory is another example of the District Court's transplantation of the rationale of the "virtually unconditional" First Amendment to the Fourth Amendment. The requirement of the exploration of alternative methods for achieving a valid purpose is a direct outgrowth of the "overbreadth" principle applicable in First Amendment cases. That is, where the inquiry is whether or not a governmental policy abridges a "virtually unconditional" right, that policy must not only represent a "compelling" interest, but it must not infringe an area where the interest is not compelling. Accordingly, the means adopted to effectuate the policy must not overstep the bounds represented by the compelling interest. See e.g. *Sherbert* v. *Verner*, 374 U. S. 398, 403; *NAACP* v. *Button*, 371 U. S.

415, 438; *Shelton* v. *Tucker,* 364 U. S. 479, 488. However, "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose." *Shelton* v. *Tucker, supra* at 488 n. 8.

Even if an inquiry into such "less drastic means" had any relevance to the reasonableness of the home visit, the alternatives suggested do not, in fact, substitute for the home visit. Thus, the District Court considered that actual residence can be verified by a duly executed lease. But, as the dissent pointed out, leases are often nonexistent (see Exh. 1, 5/2/67 [Social Study]). Moreover, if the lease were to be the test of residence, appellee would not be eligible for assistance since, for her present apartment, her lease was executed by a person described by her to her caseworker as her brother but described to the landlady as her husband (Exh. 1, 5/7/68, 6/19/68, 8/2/68). The District Court next suggested that family composition could be determined by birth certificates. However, birth certificates, even if available, need have no relation to the number of persons actually resident on the premises. Appellee sought and obtained assistance for her niece, once her residence on the premises was verified (Exh. 1, 10/26/67). A birth certificate would have told nothing.

The Court further held that the welfare of the child can be adequately discerned by examination of school and medical records. In the first place, these are collateral sources and may not be examined without permission. Their examination is more an invasion of privacy than the direct home visit. Secondly, school records in the instant case are irrelevant. The only child of appellee is now about three years old. Moreover, such records provide an inadequate substitute for a home visit which examine areas not necessarily relevant in a report prepared by an unknown third person not directly concerned with the

problems involved. And, while medical examinations are an obvious and important feature of the welfare of any person, they may also provide merely *post-facto* and ambiguous evidence of a situation which might have been prevented and which might be prevented from recurring (see *supra*, pp. 22-23).

Finally, the opinion below decides that information about needed goods and services can be furnished by the recipient if desired (A. 128), supporting its position by referring to the recent move toward simplified eligibility. However, as we have shown (Point I, B, *supra*), that system has not eliminated all home visits. More important, it has not eliminated all required services for the child, "desired" or not.

None of the alternatives proposed is an equal substitute for the home visit. Each would be simply secondary evidence on which the agency may choose to rely although it is less positive than empirical verification. Nothing in the "simplified eligibility" program invalidates the existing requirement. The real question involved is one of the State's policy in allocating its resources and in assuring itself that its resources are properly allocated. *Dandridge* v. *Williams, supra* at 4279. An untried policy is now in operation on an experimental basis. Its future depends on federal executive and state legislative assessment of its strengths and weaknesses. That this experimental program is considered a step toward better promoting individual dignity and independence is not a subject of dispute here. But to say that the Constitution required this step, is clearly erroneous. *Katz* v. *United States*, 389 U. S. 347, 350-51.

POINT II

The requirement of a home visit does not place an impermissible burden on appellee's right of privacy or privilege against self-incrimination.

Because this case arose out of appellee's refusal to permit a home visit rather than as the result of anything learned during such a visit, she has argued that the termination of assistance, after a hearing for such refusal, places an unconstitutional burden on her right of privacy and penalizes her exercise of that right, relying on *Garrity* v. *New Jersey*, 385 U. S. 493 and *Spevack* v. *Klein*, 385 U. S. 511. The theory is untenable and the reliance is misplaced.

If the home visit is reasonable within the meaning of the Fourth Amendment then the termination of assistance is not a penalty for asserting a protected right. The "right" is not protected and the assertion of a "burden" does not overcome the basic defect in appellee's position.

Moreover, both *Garrity* and *Spevack* deal with the Fifth Amendment privilege against self-incrimination. That privilege applies to a more circumscribed area than the Fourth Amendment proscription against unreasonable searches and seizures, but in its sphere it is untouchable (Point IA, *supra*). Absent a co-extensive immunity against criminal prosecution, it may not be abridged by forcing, under threat of disbarment or job loss, disclosures which can be the basis of such a prosecution. *Gardner* v. *Broderick*, 392 U. S. 273.

However, if such immunity is established, information which the relevant government agency has a right to require must be forthcoming even if it would result in severing a relationship profitable to the one seeking to withhold information. No one has an absolute call on the public fisc. See *Gardner* v. *Broderick, supra; Piemonte* v. *United*

States, 367 U. S. 556, 559, n. 2; *Ullmann* v. *United States*, 350 U. S. 422, 431; *Brown* v. *Walker*, 161 U. S. 591, 600. If information is withheld, the agency may, after a hearing, terminate the association. *Gardner* v. *Broderick, supra; Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation*, —— F. 2d ——, Second Circuit, Docket No. 34338 (April 3, 1970) Sl. Sh. Op. page 2139. The "dilemma" posed is a real one if there is information which it is desired to withhold, but that dilemma cannot overcome the need of the government to protect its funds even where it cannot prosecute.

Thus, for reasons far different from those suggested by appellee, the instant case is directly analogous to the public contract cases. The opinion below concedes, as appellee has conceded, and as we have shown, that the applicant or recipient for AFDC assistance has an obligation to provide the information necessary to establish eligibility for assistance. Appellee, making her own decision as to what is relevant, offers to provide information outside of her home. However, as we have also shown, the home is directly relevant to the eligibility determination and appellee's offer, besides being of dubious value,* cannot foreclose examination of the home which has a testimonial value of its own.

The ability of government to inform itself of certain aspects of a person's life, related to the interest involved, has been upheld in a number of situations. For example, certain people must submit to blood tests. *Schmerber* v. *California*, 384 U. S. 757. Others must allow themselves to be fingerprinted. *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd. sub nom. Miller* v.

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* Appellee's lack of candor throughout her case history and her persistent refusal to cooperate and to provide relevant information, no matter where she was asked it, would make her offer appear to be unreliable (Exh, 1, 7/20/67, 8/14/67, 11/16/67, 5/7/68, 6/19/68).

New York Stock Exchange, —— F. 2d —— (2d Cir. 1970), *cert. denied* —— U. S. ——, 38 U.S.L. Week 3453 (May 18, 1970).

Appellee availed herself of the opportunity for a prior termination hearing at which she was represented by counsel. The hearing minutes are not a part of the record but it appears from the decision of the agency that appellee did no more than claim her right of privacy (A. 17). It does not even appear that she presented the very inadequate ground alleged in the complaint, the allegedly offensive nature of the questions she might be asked. It is abundantly clear that she did not invoke her privilege against self-incrimination.

Appellee's belated and half-hearted injection of her privilege against self-incrimination into this proceeding is devoid of any weight. The argument, not even hinted at in the complaint was most fully presented to the District Court in a post-argument memorandum solicited from appellee by that Court (A. 106-107).* It runs essentially that, because the home visit might disclose information for which she might be prosecuted, appellee may not be required to open her home to that possibility.

In the first place, appellee has never directly asserted that this is her claim. In the second place, the argument is wholly inconsistent with appellee's avowed willingness to provide any relevant information outside her home. Such information stands on no different footing, for self-incrimination purposes, from what is learned during a home visit. It could, under appellee's rationale, lead to prosecution no less easily. Accordingly, there is no reason to apply one standard to an interview in the home and another to an interview outside the home on this basis.

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* Appellant was neither notified of this request nor requested by the Court to brief the question. When appellant received appellee's memorandum (A. 108-114), permission was requested to reply (A. 115-118).

The remote possibility of criminal prosecution underlies any situation where benefit is sought to be secured by the furnishing of information. These run the gamut from tax deductions to farm price supports. This possibility does not mean that an entire administrative program must be placed within the confines of the standards to be observed in conducting criminal prosecutions. See *United States* v. *Walden*, 411 F. 2d 1109 (4th Cir. 1969). It is not the purpose of the home visit to obtain information for prosecutorial purposes. Contrast *Gardner* v. *Broderick*, *supra*; *Parrish* v. *Civil Sevice Commision*, *supra*. This is strongly evidenced by the fact that the home visit here was sought to be made on a week's notice and by the careful way in which home visits are circumscribed (*supra*, pp. 27-29).

One of the most acute problems in the administration of the New York City AFDC program—overpayment—(*Report of Findings of Special Review*, *supra*), may provide no basis for criminal prosecution and need not be dealt with on that level. However, the agency certainly must know if it is overpaying and must be able to correct the error. Should evidence nevertheless be obtained which might be made the basis of a criminal prosecution, it would be a simple matter at the time of such prosecution to test the issue by a motion to suppress. *Murphy* v. *Waterfront Commission*, 378 U. S. 1; *United States* v. *Blue*, 384 U. S. 251, 256. See *Lynumn* v. *Illinois*, 372 U. S. 528.

Similiarly, the existence of federal and state provisions requiring prosecution for welfare fraud (A. 108-114), does not alter the fact that such prosecution must be based on admissible evidence. Indeed, the home visit is not the chief, or even a significant means, of obtaining evidence of fraud (A. 115-116).

POINT III

The requirement imposed by the Court of a search warrant to make a refused home visit was an unauthorized supervision by the Court of the essential procedure determined by the State as requisite.

The District Court held that, once a home visit has been refused, the administrative agency may not terminate assistance but must, instead, obtain a "suitably restricted" (A. 129) search warrant and make the visit. This was an unwarranted assumption of supervision by the Court of the administration of welfare. See *King* v. *Smith*, 392 U. S. 309.

This anomalous result was attempted to be justified by reliance on the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530, holding that area inspections by such officials as fire and health inspectors must be made on warrants if entry is refused. Several crucial differences demonstrates the total inapplicability of *Camara to* this case.

First, the health or fire inspection is, by definition, a search for a violation punishable by law. Second, refusal to allow the inspection is punishable by criminal sanction. Third, the inspection is an examination of an objective condition such as faulty wiring which can be particularly described in a warrant. The home visit, by contrast, is not a search for incriminating evidence, and it is not enforceable by the criminal law. It is, moreover, not geared to a solitary factor which can be described in a warrant. It is a complex of tangible and intangible factors not designed to verify an isolable condition but directed to all of the factors bearing on the welfare of the children in the household and the fact that allocated funds are being directed, in the proper amount, to that welfare.

The complaint in this case graphically illustrates this inappropriateness of a search warrant to a home visit. Ap-

pellee's sole concern in the complaint is the questions she is asked during a visit. No warrant could solve this complaint and the District Court made no effort to deal with it.

There is a classic example of the home visit for interview purposes for which no warrant has been held to be required. That is the decennial visit of the census taker. Only this year has that visit been widely eliminated and then only for administrative, not constitutional reasons. Moreover, many of the questions asked by the census taker bear a remarkable congruence to the criteria of eligibility for assistance. *United States* v. *Rickenbacker,* 309 F. 2d 462 (2d Cir. 1962), *cert. denied* 371 U. S. 962.

A warrant is not necessary to inform a recipient of the purpose of the home visit. Nor is it necessary to limit the scope of that visit. The regulations covering the home visit do that. Indeed, appellee has successfully circumscribed the home visit on a number of occasions with no adverse results (5/2/67, 11/16/67, 5/7/68).

Thus, the principal reason for the warrant requirement in *Camara* is inapplicable here:

> "Under the present system, when the Inspector demands entry, the occupant has no way of knowing whether enforcement of the Municipal Code involved requires inspection of his premises, no way of knowing the lawful limits of the Inspector's power to search, and no way of knowing whether the Inspector himself is acting under proper authority." *Camara* v. *Municipal Court, supra* at 532.

See also *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263.

Thus, the purpose of the administrative warrant is not so much to establish probable cause, which is found in the valid governmental purpose involved, but to establish the nexus between the purpose of the visit and the person seeking entry to the home. Such a nexus already exists

between an applicant or recipient and the caseworker. It must be remembered that the home visit is not meant to turn the entrance of appellee's home into a revolving door. The fire inspector may no less be required to secure a warrant to enter her home than to enter any other person's. Appellee is required to permit entry to only one person, her caseworker, at specified intervals, prescribed by statute, under specified conditions. A warrant can do no more.

A warrant can do no more, that is, unless appellee's position at oral argument before the three-judge court is adopted. For there, appellee sought to have this case governed only by the criminal law, contending that appellee's home can be visited only if there is probable cause to believe she has committed a crime and then only on a warrant (A. 82). The opinion of the majority failed to enunciate clearly its reaction to this contention. In any event, the position of the appellee is wholly unjustified. Its effect, and, indeed, the effect of any warrant procedure, would only be inimical to the purposes of the AFDC program. As Judge McLean pointed out in dissent, "the warrant . . . [will] introduce a hostile relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust" (A. 136). The welfare worker would be transformed into a policeman and, thus, undercut the privacy and dignity of the individual. The administration of the program would be severely straitened. *Cf. Flemming* v. *Nestor,* 363 U. S. 603. The child would be effectively insulated from the agency. And it must be remembered that this case does not involve the unconscionable midnight raid or any other procedure designed to secure incriminating evidence. *Parrish* v. *Civil Service Commission, supra.*

While it does not appear to accept the criminal limitations on the home visit by warrants, the District Court

establishes absolutely no standards for such warrants. It does not indicate whether probable cause exists by virtue of the fact that it is time for the periodic review or whether the home visit must be refused before a warrant may issue. It does not state whether still more may be required such as a showing that, for example, the child is having trouble in school; that he is tardy or truant; that his grades are low or failing. The opinion does not indicate how a warrant could be "suitably restricted" to deal with these problems.

The District Court has created the anomalous situation of requiring search warrants to verify whether or not someone who has requested an allocation for which eligibility must be shown is entitled to the allocation. The State should not be required to go to the extent of employing such procedure to discover entitlement. While the State performs an assumed responsibility to assist an applicant or recipient to establish eligibility, it does not have an obligation to assist her in establishing such eligibility over her objection.*

Appellee's relationship with the Social Services Department may be analogous in some respects to a licensee in a closely regulated industry. Like the licensee, she has a specific relationship with an administrative agency and knows its nature and extent (Exh. 1, Intake Interview, Par. IV). She also knows her obligations under that relationship. Moreover, she knows the result of her failure to meet that obligation (A. 9).

Consequentiy closely apposite is the recent decision of this Court in *Colonnade Catering Corp.* v. *United States*, —— U. S. ——, 38 U.S.L. Week 4167 (February 25, 1970). In that case, an agent of a liquor licensee refused to open a locked portion of the licensed premises to Internal Revenue

* Thus, the holding of the District Court that its rule applies to applicants as well as recipients of AFDC assistance is particularly untenable.

Agents seeking proof that the licensee was selling untaxed liquor. The agents forced the door and seized certain bottles which formed the basis of a criminal prosecution. The Court of Appeals for the Second Circuit upheld the search because of the specificity of the statute in providing for inspections and the nature of the relationship between the licensee and the Internal Revenue Service (which is not the licensing authority).

While this Court reversed, its decision was based on the ground that the inspection statute did not authorize breaking in. It authorized only a fine for refusal to permit the requested inspection. The Court had no doubt that the statute could have provided for breaking in, even to obtain proof of criminal violation, in view of the nature of the regulatory interest 38 U.S.L. Week at 4169.

Unlike the officers in *Colonnade,* the agency in this case acted within the scope of its authority. Rather than force entry, it took the course provided of terminating assistance only after a hearing. Given the nature of the program at issue, this was the only appropriate response. In this respect, its action is not unlike that of a tax review board where, if proof is not forthcoming of a claimed deduction, the deduction is disallowed.

POINT IV

Particularly in view of the unique character of this case, it was not ripe for federal consideration in the absence of State review of the action of the New York City Department of Social Services.

Appellee has insisted throughout that the sole issue to be determined in this case is one of the rigid application of law to the pure issue of the right to make a home visit or to wreak the harsh result of terminating public assistance. Certainly, the law is clear that a home visit must

be made to determine initial eligibility for assistance (18 N.Y.C.R.R. § 351.10). With respect to continuing eligibility, the State requires a "contact" which may be a home or an office visit (18 N.Y.C.R.R. § 351.21). Some discretion, thus, rests in the administrative agency. This is not to say that the option rests with the client. It is to say that the agency has some latitude to take the client's preference into account if circumstances warrant it.

Despite the claim to represent a "class", appellee points to no other case in which action similar to the action in her case was taken. At the time her assistance was discontinued, appellee had been receiving aid for two years. She had never established her initial eligibility; she had never cooperated in attempts to learn whether the father of her child could contribute to his support (it is not even clear whether she is married); she had persistently requested items to which she was not entitled. Continuation of assistance under these circumstances became increasingly unjustifiable. Once appellee removed the possibility of verifying her continuing need by denying entry to her home, continuation of assistance could not be justified. New York maintains the most extensive AFDC program in the country.* Neither funds nor manpower is unlimited however. Appellee was accepted for assistance despite her questionable eligibility because of the imminence of the birth of her child (Exh. 1, 5/2/67 [Recommendation]). However, the need for such assistance, granted especially under such circumstances, cannot go perpetually unverified. The public interest demands that funds must not be allocated which need not be allocated.

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* The AFDC program in New York City alone involves 187,214 cases, totalling 722,830 persons receiving benefits amounting to $53,620,000 a year. 1968 figures. COMMITTEE ON WAYS AND MEANS, U. S. House of Representatives, *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), Tables A-13; A-15.

Appellee failed to call on the State in this case to balance her claims against the interest of the public at large. This failure should have barred or postponed federal litigation. Not only was a State forum available, but it should have been used. First, at the time this action was commenced, appellee had available to her a full range of constitutionally adequate administrative remedies. *Kelly* v. *Wyman*, 294 F. Supp. 887 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg* v. *Kelly*, —— U. S. —— 38 U.S.L. Week 4223 (March 23, 1970). The case is thus to be contrasted with *McNeese* v. *Board of Education*, 373 U. S. 668 and *Monroe* v. *Pape*, 365 U. S. 167 in which the Court expressed some doubt as to the availability of State relief. See *McNeese*, 373 U. S. at 674; *Monroe*, 365 U. S. at 183. See also *Dale Book Co.* v. *Leary*, 389 F. 2d 40, 42 (3rd Cir. 1968); *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967); *Potwora* v. *Dillon*, 386 F. 2d 74 (2d Cir. 1967). The adequacy of the available remedy in *Damico* v. *California*, 389 U. S. 416 does not appear in the opinion, although that case does pre-date *Goldberg* v. *Kelly*, *supra*.

Second, unlike the appellant in *Damico*, the appellee here began but did not complete the administrative process. She had a prior termination hearing but did not proceed to a state fair hearing. She should not be able to abandon her state remedies in mid-stream to seek a federal forum. Complete exhaustion of administrative remedies was particularly important here because of the vague nature of the complaint and the essentially administrative nature of the relief sought. Appellee was complaining about being asked unspecified questions. The twelve recipients supporting her position complained of the timing of visits and the circumstances under which interviews are conducted (A. 33-56). Such details are properly resolved by the administrative body involved.

Finally, a state forum, judicial or administrative, might have been able to alter substantially the nature of the questions involved (*Harrison* v. *NAACP*, 360 U. S. 167)

by its interpretation of Section 134-a of the New York Social Services Law which requires investigation of an application and personal contacts but does not mandate a home visit. This would apparently be a case of first impression for the State agency which could promulgate a flexible rule or adhere to a strict one. The question is one of policy for the State in the supervision of its AFDC program. *Rosado* v. *Wyman, supra* at 4273; *Dandridge* v. *Williams, supra; King* v. *Smith, supra.* At the least, they might require a showing of individual necessity for a home as opposed to an office visit before termination of aid if such a course were deemed wise. See *Reetz* v. *Bozanich,* —— U. S. ——, 38 U.S.L. Week 4170 (Feb. 25, 1970).

POINT V

The District Court acted prematurely and precipitously in granting plenary relief to appellee and the class she purports to represent without a full record. Accordingly, this case should, at the least, be remanded to the District Court with instructions to conduct a hearing of the issues.

The instant case had a short, full life in the District Court. The order to show cause was served, without prior notice, on the office of the attorney for the appellant on Friday, June 6, 1969, to be returnable at 10:00 A. M. on Tuesday, June 10, 1969 (A. 19). On that date, the attorney assigned to the case requested an adjournment and was given until June 13, 1969 to submit papers in opposition to the convening of a three-judge court and the issuance of a temporary restraining order. On June 13, the same day the papers were filed, Judge Tenney, in an opinion, ordered the convening of a three-judge court and issued a temporary restraining order with respect to the entire class of applicants and recipients of AFDC assistance (A. 27-31, 32-33).

The three-judge court was designated during the following week and attorneys for the appellee and appellant Wyman were informed by telephone that appellee's brief was due on June 23, 1969, the appellant's brief was due three days later, on June 26, 1969, and that oral argument would be heard on June 30, 1969. Appellant Goldberg's attorney was not informed by the Court of this schedule and found it impossible to meet when informed by counsel for appellant Wyman (A. 61).

Despite this fact, despite the fact that counsel for appellant Wyman protested this schedule orally to the Chambers of Judge Tenney, and despite the fact that a temporary restraining order was in effect, this unrealistic schedule was rigidly adhered to.

On the appointed dates, appellee submitted a brief and identical affidavits from twelve AFDC recipients (A. 33-56), appellant Goldberg submitted an answer (A. 57-58), and appellant Wyman submitted a motion to vacate or modify the temporary restraining order (A. 71), an answer and Exhibit (A. 62-66), an affidavit by a Deputy Commissioner of the New York State Department of Social Services (A. 67-70) and a memorandum of law directed to the question of whether or not a preliminary injunction should issue.

It was clear from the limitation of appellant's memorandum and from the offers at oral argument to obtain additional material (A. 86, 88), that the case was not in a posture for final decision. The District Court nevertheless granted both declaratory relief and a permanent injunction (A. 137-138). Declaratory relief was jurisdictionally unwarranted since, although answers were filed to the complaint, there was no finding, with respect to any disputed issues of fact and no motion for summary judgment.

This jurisdictional deficiency was compounded by the granting of a permanent injunction in utter disregard of the offers of additional evidence and the limited nature of appellant's memorandum.

At the very least, the District Court should have directed a trial of the issues. This is especially clear from the fact that it rested its opinion on the existence of viable alternatives to a home visit. These "alternatives" have no foundation in fact (*supra*, pp. 29-31). Of course, it is our basic position that we need not show the absence of other means for obtaining evidence of eligibility (*supra*, pp. 16-18, 29-30). However, if such a showing must be made, there must also be an opportunity to make it. This Court has emphasized that constitutional issues should not be decided except upon a full record. *Honeyman* v. *Hanan*, 300 U. S. 14, 25-26. Certainly, the District Court could not know if home visits could be dispensed with, since the results of the program experimenting with such a program are not yet known (and even that program does not dispense with all home visits). But appellant never had time even to explore the existence of evidence in support of home visits.

CONCLUSION

The decision below should be reversed and the complaint dismissed. In the alternative, the case should be remanded with instructions to hold a trial or to refer the appellee to her State remedies.

Dated: New York, New York, June 9, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

—v.—

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated,

Appellees.

BRIEF FOR THE LEGAL AID SOCIETY OF SAN MATEO COUNTY, AS *AMICUS CURIAE*

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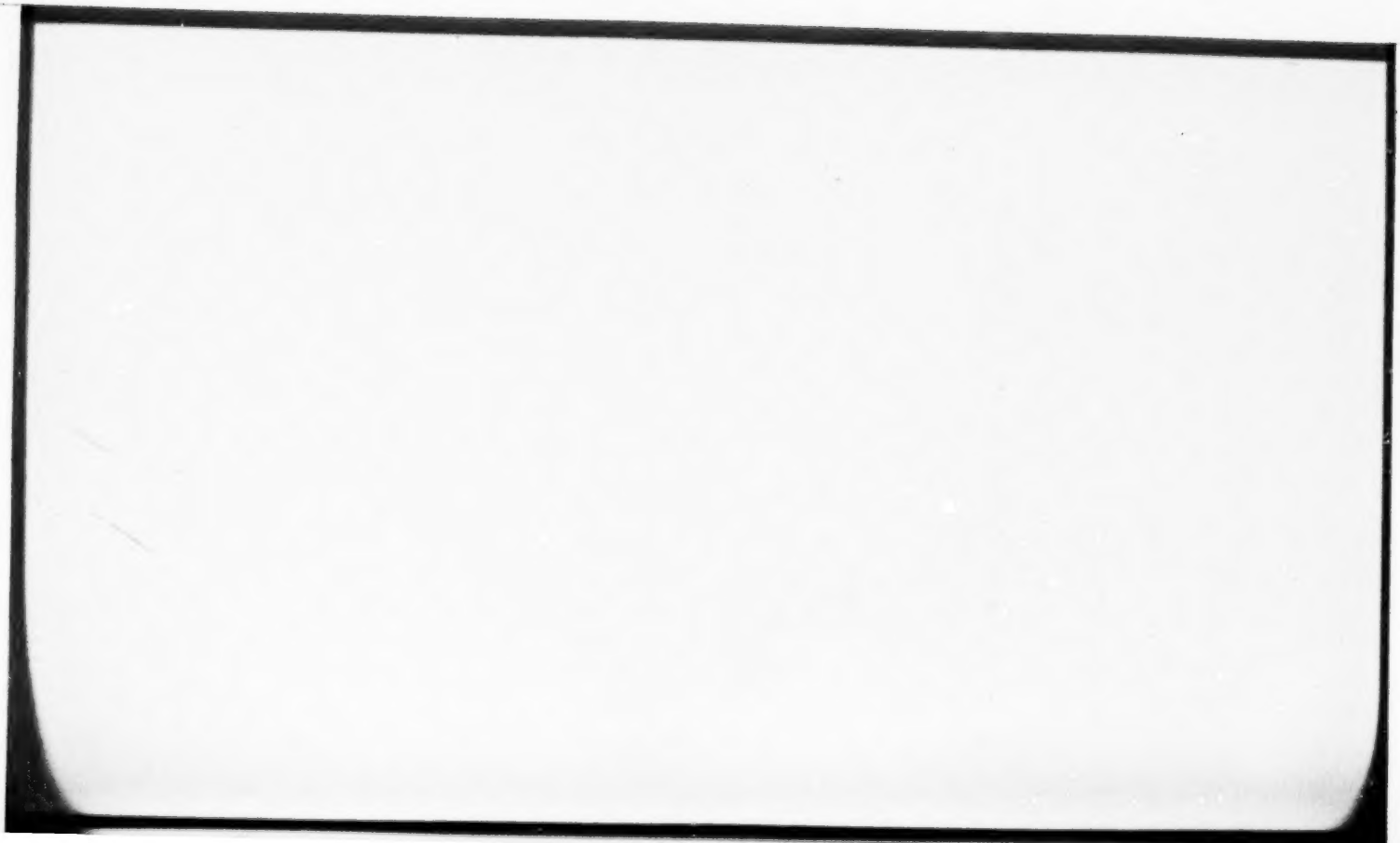

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MISCELLANEOUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 977

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

—v.—

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated,

Appellees.

BRIEF FOR THE LEGAL AID SOCIETY OF SAN MATEO COUNTY, AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Legal Aid Society of San Mateo County is an O.E.O. federally funded organization which renders legal assistance to the poor, who are unable, on account of poverty, to employ and engage legal aid on their own behalf. Most of our clients receive public assistance, and it has been a central function of the Society to secure and protect their rights in the administration and implementation of the welfare program. We recently participated before this Court in the case of *Lewis v. Martin*, 25 L.Ed.2d 561 (1970).

The Society is deeply concerned that fundamental constitutional protections should not be denied welfare recipients solely because they are on welfare and necessarily depend on the state for daily sustenance. We therefore strongly support the decision of the court below which guarantees Fourth Amendment protection to persons on welfare.

The parties have consented to the filing of an *amicus curiae* brief by the Legal Aid Society of San Mateo County. Copies of their letters of consent will be submitted to the Clerk with this brief.

SUMMARY OF ARGUMENT

The purposes of determination of eligibility and safeguarding the welfare of the child, asserted by New York as reasons for making the welfare home visit, do not justify the relaxation of the Fourth Amendment requirement of a warrant.

There is no justification to lessen or change the traditional standard of probable cause for the issuance of the warrant for most welfare home visits. In only one instance, where visual verification in the home is absolutely essential, the standard admits of minimal change.

The Department of Health, Education and Welfare, through regulation, does not permit home visits to be made without consent, except in connection with quality control of an experimental simplified determination of eligibility program.

ARGUMENT

The immediate issue for decision in this case is whether the Fourth Amendment requirement of a search warrant is applicable to welfare home visits. If the Court determines that a warrant is required for home visits, it may also wish

to address the question of the circumstances under which such a warrant could constitutionally issue. *See Camera v. Municipal Court*, 387 U.S. 523, 534-39 (1967). We discuss these points, respectively, in Parts I and II *infra*. In Part III, we make an additional point: that the judgment below must be affirmed because a binding federal regulation, applicable to all federally assisted welfare programs, forbids unconsented home visits, whether or not supported by a warrant, and thereby impliedly forbids state coercion of consent to home visits.

I. In the Absence of Valid Consent, a Welfare Home Visit Not Supported by a Warrant Violates the Fourth Amendment.

The point is not worth debating whether a welfare home visit is a "search" within the meaning of the Fourth Amendment. Obviously, every unconsented entry by a government agent into an individual's home is a Fourth Amendment "search."[1] Appellants' brief in this Court does not contend otherwise.

It is also plain, we think, that with a few "jealously and carefully drawn exceptions", *Jones v. United States*, 357 U.S. 493, 499 (1958), the fundamental rule of the Fourth

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1. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958) Pursuant to this purpose, every sort of entry by public authorities into private premises has been subjected to Fourth Amendment restraint: entries to search for and to seize illicit objects, *United States v. Jeffers*, 342 U.S. 48 (1951); *Chapman v. United States*, 365 U.S. 610 (1961), entries to arrest persons, *Johnson v. United States*, 333 U.S. 10 (1948); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), entries to converse with inhabitants, *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940), entries to conduct regulatory inspections, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967), and welfare searches, *Parrish v. Civil Service Commission*, 66 Cal. 2d 260, 425 P.2d 223 (1967).

Amendment requires that any entry into an individual's home "must rest upon a search warrant." *Stoner v. California*, 376 U.S. 483, 486 (1964). An unbroken line of cases in this Court makes indisputably clear that the warrant requirement is the very heart of the Amendment. *See e.g., Agnello v. United States*, 269 U.S. 20, 32 (1925). *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *Chapman v. United States*, 365 U.S. 610, 613-15 (1961); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Chimel v. California*, 395 U.S. 752, 762 (1969); *Vale v. Louisiana*, 38 U.S.L.W. 4544 (June 22, 1970)

For this reason appellants are wrong when they quarrel with the court below for requiring that a "compelling state interest" be shown to justify a warrantless home entry. (A.127). Such a ruling is not, as appellants suggest, a dubious importation of First Amendment principles into the Fourth Amendment. (Appellants' brief, pp. 16-18). The court below did not hold that "a compelling state interest" must be shown to authorize a search, but rather that a "compelling state interest" must be shown to authorize the allowance of a class of warrantless searches: that is, as the court expressly phrased it, to authorize "creation of a general exception to the Fourth Amendment's warrant requirement." (A.127) This is traditional and unquestionably proper Fourth Amendment law. It is exactly what this Court said in *Chimel v. California, supra*, 395 U.S. at 762: "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . .' "[2]

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2. Apart from cases of consent, which appear to rest upon the concept of waiver of Fourth Amendment rights, *See Amos v. United*

So the question in this case, as the court below quite properly saw it, is whether New York has made the showing of compelling need for a power of warrantless home entries that will justify exemption from the warrant requirement. "[T]he question is not whether the public interest justifies the type of search in question," *Camara v. Muincipal Court, supra,* 387 U.S. at 533, but rather whether the governmental purposes New York seeks to achieve justify an exemption for welfare home visits from the

> one governing principle, justified by history and by current experience, [that] has consistently been followed: except in carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. (*Camara v. Municipal Court, supra,* 387 U. S. at 528-29).

We turn now to the governmental purposes New York asserts in its Brief: determination of eligibility, and safeguarding the welfare of the child.

States, 255 U.S. 313 (1921); *Johnson v. United States,* 333 U.S. 10 (1948); *Stoner v. California,* 376 U.S. 483 (1964); *Bumper v. North Carolina,* 391 U.S. 543 (1968), each of the few recognized exceptions to the warrant requirement has in fact been limited by this Court to situations in which a compelling governmental need for warrantless search appeared. The "moving vehicle" exception of *Carroll v. United States,* 267 U.S. 132 (1925), was so limited in *Preston v. United States,* 376 U.S. 364 (1964), and *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); the exception for searches incident to arrest recognized in *United States v. Rabinowitz,* 339 U.S. 56 (1950), was thus limited in *Chimel v. California,* 395 U.S. 752 (1969); and of course the "hot pursuit" or "exigent circumstances" exception of *Warden v. Hayden,* 387 U.S. 294 (1967), is inherently so limited. Except for *Warden v. Hayden, supra,* and a very few search-incident-to-arrest cases, *e.g., Harris v. United States,* 331 U.S. 145 (1947) (overruled in *Chimel supra*), this Court has never sustained a warrantless dwelling entry under the Fourth Amendment.

A. DETERMINATION OF ELIGIBILITY.

"The required home visit is an *aid* in determining eligibility.... It is a means of assuring that funds are allocated only to persons who are eligible for them, that they are allocated to the extent to which they are necessary and that they are used for the purpose for which they are allocated...." (emphasis ours), (Appellant Wyman's brief, p. 19). We do not deny that the welfare department has a legitimate interest in protecting its funds. We do deny that this interest compels warrantless entries into welfare homes, when the home visit is admittedly only an "aid" in determining eligibility, not the primary source[3] nor the only source. The welfare department has innumerable available alternative means of determining and verifying eligibility.[4]

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3. "In determining initial and continuing eligibility: Applicants and recipients will be relied upon as the primary source of information upon which the agency's decision is made about their eligibility." *Federal Handbook of Public Assistance Administration*, Part IV, § 2200(e)(1).

4. "A listing of all items which are required [for a determination of eligibility] could be furnished and applicant could bring them to the agency office." [Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York, A.69] The items referred to above such as bank books and birth certificates could be brought to the welfare office; residence can be checked either by a lease, or if that is unavailable (Appellant Wyman's brief, p. 30) a rent check or rent receipt can be requested, or the mailbox can be checked. It belies reason for the welfare department to insist that the home visit is required. To be sure, it may be more expedient to make the home visit, but we are dealing here with the withdrawal of a vital constitutional right which cannot be erased by mere showing of expediency. Nor can the home visit be justified by the few, if any, items which must be visually verified, such as the need for a new mattress. (Appellant Wyman's brief, p. 23). New York does not now have that problem as they have discontinued special needs. *Rosado v. Wyman*, 397 U.S. 397 (1970). In any event, we do not assert that a home visit may not be made on those few occasions; but only that it be made with a search warrant. The standard of proof necessary for the warrant's issuance will be discussed in Part II.

The justification fades entirely with the recognition that anything discovered in the home which might establish ineligibility could be used as the basis for a welfare fraud prosecution.[5] This brings the welfare home visit directly

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5. Apart from general theft prosecutions, all the states in the union prosecute specifically for welfare fraud; indeed, at least ten states deem welfare fraud a felony and penalize accordingly. The Code of Ala. tit. 49, § 17 (21) (1969); Alas. Stat. tit. 47, §§ 47.25.280, .290 (1962); Ariz. Rev. Stat. tit. 45, § 46-215 (1962); Ark. Stat. Ann. tit. 83, § 83-137 (1960); Cal. Welf. and Inst. Code §§ 11482, 11483, 12103, 12850 (1966); Colo. Rev. Stat. ch. 119-2-21 (1963); Conn. Gen. Stat. Ann. tit. 17, §§ 17-102, -132 (1963); Del. Code Ann. tit. 31, ch. 23, § 2317 (1953); D.C. Code Encyclopaedia tit. 3, § 3-216 (1966); Fla. Stats. Ann. tit. 28, § 409.36 (1959); Code of Ga. Ann. tit. 99, § 99-9904 (1968); Hawaii Rev. Stats. tit. 20, § 346-34 (1968); Idaho Code tit. 56, § 56-227 (1948); Ill. Stat. Ann. ch. 23, § 11-21 (1967); Ind. Stat. Ann. tit. 52, § 52-1404 (1964); Iowa Code Ann. tit. XI, §§ 239.14, 241.19, 241A.12 (1969); Kan. Stat. Ann. ch. 39, § 39.720 (1964); Ky. Rev. Stat. tit. XVII, § 205.225, 205.990 (1969); La. Rev. Stat. tit. 46, § 114 (1970); Me. Rev. Stat. Ann. tit. 22, § 3304 (1964); Ann. Code of Md. art. 88A, § 62 (1969); Mass. Gen. Ann. Laws ch. 707, § 1 (1969); Mich. Stat. Ann. tit. 16, § 16.460 (1970); Minn. Stat. Ann. §§ 256.31, 256.68, 256.83 (1959); Miss. Code Ann. tit. 25, § 7183 (1953); Ann. Mo. Stat. tit. 12, § 208.200 (repealed) (now tit. 38, §§ 560.156, .161; Rev. Code of Mont. tit. 71, § 71-226 (1962); Laws of Neb. ch. 394, § 5 (1965); Nev. Rev. Stat. tit. 38, §§ 425.240, 425.250, 427.280 (1967); N.H. Rev. Stat. Ann. tit. XII § 167.17 (1964); N.J. Stat. Ann. tit. 2A, ch. 111, § 2A:111-3 (1969); N.M. 1953 Stat. Ann. ch. 13, § 13-1-32 (1953); N.Y. Consol. Laws bk. 52A, Art. 5, § 145 (1966); Gen. Stat. of N.C. ch. 108, § 108-48 (1969); N.D. Century Code Ann. tit. 50 §§ 50-09-23, -07-38 (1960); Ohio Rev. Code Ann. tit. 51, § 5107-99 (1954); Okla. Stat. Ann. tit. 56, §§ 147, 185 (1969); Ore. Rev. Stat. tit. 34, §§ 411.620, 411.660 (1969); Pa. Stat. Ann. tit. 62, § 481 (1968); Gen. Laws of R.I. tit. 40, § 40-9-18 (1969); Code of Laws of S.C. tit. 71, § 71-66 (1962); S.D. Compiled Laws Ann. tit. 28, §§ 28-7-20, -8-18, -9-15 (1967); Tenn. Code Ann. tit. 14, §§ 14-221, -320, -523, -709 (1969); Tex. Stat. Public Welfare Act of 1941, art. 695c, § 34 (1964); Utah Code Ann. tit. 55, § 55-15-31 (1969); Vt. Stat. Ann. tit. 33, ch. 26, § 2583 (1969); Code of Va. tit. 63.1, § 63.1-124 (1968); Rev. Code of Wash. tit. 74, § 74.08.331 (1965); W. Va. Code ch. 9, § 9-11-11 (1969); Wis. Stat. Ann. ch. 49, §§ 49.12, .34 (1969); Wyo. Stat. tit. 42, § 42.21 (1969).

in line for receipt of traditional Fourth Amendment criminal search requirements, which have indeed been imposed in *Parrish v. Civil Service Commision of the County of Alameda,* 66 Cal.2d 260, 425 P.2d 223 (1967), a case involving a welfare search. In holding that the Fourth Amendment was violated by the warrantless welfare search, the court in *Parrish* had no recourse but to distinguish *Frank v. Maryland,* 359 U.S. 360 (1959), which had not yet been overruled. Two central distinguishing factors were found, both involving the criminal overtones of the welfare search.[6] The *Parrish* court asserted first, that the evidence sought in *Frank* would not itself have afforded a basis for criminal prosecution, while in the welfare search it would have. Second, it was clear that the welfare search was utilized to seek evidence of ineligibility for the purpose of cancelling welfare benefits, and this, the *Parrish* court found, was the same as seeking evidence for forfeiture; the *Frank* Court itself distinguished between searches which advance the general welfare without recourse to criminal proceedings, and searches for evidence to be used in criminal prosecution or forfeiture. *Parrish v. Civil Service Commission of the County of Alameda, supra,* 66 Cal. 2d at 266-67, 425 P.2d at 227-28.

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6. "If the *Frank* distinction between the criminal and noncriminal searches should fall, the county's contention [that a warrant was not required] would of course collapse. Although two cases now pending before the United States Supreme Court (*Camara v. Municipal Ct. of San Francisco No. 92; See v. City of Seattle No. 180* [prob. juris noted (1966) 385 U.S. 808 [17 L.Ed. 2d 50, 87 S. Ct. 31]]) raise the question of whether the *Frank* doctrine should be overruled, we may assume for present purposes that the Court will adhere to its holding in *Frank*, since, as we explain below, we do not find that holding controlling under the circumstances here before us." *Parrish v. Civil Commission of the County of Alameda, supra,* 66 Cal. 2d at 266, n. 7, 425 P.2d at 227 n. 7.

To be sure, the welfare search in *Parrish* was the home visit taken to an extreme, but the time of day, and number of homes involved do not make constitutional differences. The Fourth Amendment warrant has been held to be required in single, non-violent entries, *Amos v. United States,* 255 U.S. 313 (1921); periodic civil administrative inspections, *Camara v. Municipal Court,* 387 U.S. 523 (1967), as well as mass fishing expeditions, *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966).

Considering that there are alternative means [illegible] mining eligibility, and that the home visit entry m[illegible] in criminal prosecution, we find it hard to accept Judge McLean's opinion that the warrant will "introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust." (Dissenting Opinion below, A.136). A hostile relationship is built into a system which forces a welfare family to submit to periodic intrusions into its home without the basic constitutional protections afforded society in general, and more so when these invasions may lead to forfeiture of basic subsistence and criminal prosecution.[7] Further, there can be no doubt that confidence and

7. Judge McLean entirely overlooks the very essence of the Fourth Amendment protection. "It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Boyd v. United States,* 116 U.S. 616, 630 (1886). The sanctity of a man's home is at issue here. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality. . . . That we are often 'captives' outside the sanctuary of the home . . . does not mean we must be captives everywhere. . . . The asserted right . . . stops at the outer boundary of every person's domain." *Rowan v. U.S. Post Office Dept.* 38 U.S.L.W. 4343, 4346 (May 5, 1970).

trust exist only when deserved, and will not survive demeaning tactics and procedures. (Affidavits of Welfare Recipients, A.33-56).

We reach the conclusion that determining eligibility does not compel an exemption to the warrant requirement of the Fourth Amendment.

B. SAFEGUARDING THE WELFARE OF THE CHILD.

The second primary purpose, posited by appellants as justifying the reasonableness of a warrantless home visit entry, is their claim that they are unable to execute their role as guardian and protector of welfare children without it.[8] The federal law, cited as the delegator of this role, is 42 U.S.C. § 602(a)(d)(14). (Appellant Wyman's brief p. 20). That provision, enacted in 1968 as an amendment to the Social Security Act, was designed solely to require the states to make available child-welfare and family services, including, as an example, day-care services for working mothers of dependent children. It has always been and remains the option of the welfare client to accept or reject these social services. (*Federal Handbook of Public Assistance Administration,* Part IV, § 4241).

We cannot comprehend the welfare department's insistence that a warrantless entry must be made into a welfare home to inform recipients or even to encourage recipients to accept the services. (Appellant Wyman's brief at pp. 21-22). The available social services can be discussed and explained as fully in the welfare office as in the recipient's home. The interest, sensitivity and good intentions of the social worker are important and relevant, not the geo-

8. We accept this purpose as stated, even though the Record does not indicate that the child's presence was specially requested by the social worker who asked for a home visit appointment.

graphical site of the discussion; the home venue can add nothing. Contrary to the Walsh affidavit,[9] welfare recipients may be poor, but they are not unaware nor unperceptive of their needs and problems. They know if their furnishings are inadequate, need repair, or if they are living in unsafe conditions. The problem is not lack of knowledge, but lack of funds. The welfare grant has been and remains inadequate to alleviate the hardships they bear. The answer is not to force entry into their homes to study the situation, but rather to increase assistance payments. But this is not the reality of the poor. Their public assistance grant is decreased,[10] and then their condition of poverty is said to justify the withdrawal of their basic Fourth Amendment right to privacy in the home. (Appellant Wyman's brief, p. 22). This vicious cycle is unjust and unsupportable. Welfare recipients already live the indignity of being poor. That hardly justifies a lessening of their constitutional rights which are the birthright of all citizens.

> Does "indigence" . . . constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being with-

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9. Appellant Wyman's brief pp. 21-22, A.70, Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York. The Walsh affidavit asserts in effect that poor persons are incapable of understanding their needs unless those needs are explained and physically pointed out to them by government agents.

10. *See Rosado v. Wyman,* 397 U.S. 397 (1970).

out funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color.[11]

We further question and are troubled by the welfare department's assumption that federal law delegates to it the right to assume the role of parent, as outlined in 18 N.Y.C. R.R. § 369.2(c), cited in appellants' brief at p. 20, and referred to by the Walsh affidavit, A.69-70. This was never intended as a federal policy. Rather:

> Parents have the right to make decisions affecting them and the welfare of their children. Similarly children have the right to look to their parents for such decisions. These rights and responsibilities are not abridged lightly, and *only by the courts* when circumstances and conditions pose serious threats to the welfare of the children or reveal serious failure of the parents to provide adequate care and guidance for them. *Federal Handbook of Public Assistance Administration,* Part IV § 4223.1 (emphasis ours)

Some circumstances and conditions, recognized by H.E.W. in its regulation above, pose serious threats to the welfare of the child, and the state can then intervene. Common examples are child abandonment, the battered child situation, and extreme neglect. State intervention in these situations is generally accepted and generally applied to all families, poor or rich. We have no doubt that if a state did much more, and presumed to judge on a periodic basis whether *every* home situation, wealthy or poor, was one where "a child's physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected," such a regime would be declared invalid as an

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11. *Edwards v. California,* 314 U.S. 160, 184-85 (1941) (Mr. Justice Jackson concurring).

unconstitutional invasion of the private realm of family life. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); *See Griswold v. Connecticut,* 381 U.S. 479 (1965). Nor do we doubt that singling out one class of persons—poor persons in need of A.F.D.C. assistance—for state regulation in regard to such matters as the "moral well-being" and preservation of "religious faith" of their children must be immediately condemned as an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Yet New York not only presumes thus to dictate the conditions of private life of welfare families, and *only* of welfare families; it also seeks to support warrantless invasions into welfare homes in order to enforce its dictates. The violation of two constitutional rights is said to justify withdrawal of a third.

The public outcry which would be unleashed if every man were subjected to such treatment would surely reach the ears of the Gods. But when the welfare recipient cries out, if he is heard at all, the response too often is "beggars can't be choosers." If we wish to survive as a free society, we must eventually recognize that:

> When we degrade welfare recipients, we are eroding the very values we seek to preserve. But it is not merely enlightened self interest, but justice, that demands a new design for social welfare.[12]

The asserted purpose of safeguarding the welfare of the child does not come close to justifying an exemption from the warrant requirement of the Fourth Amendment. We conclude that in the absence of valid consent, a welfare

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12. Reich, *Social Welfare in the Public-Private State,* 114 U. Pa. L. Rev. 487, 493 (1966).

home visit not supported by a warrant violates the Fourth Amendment.[13]

II. Probable Cause Standard for the Welfare Home Visit Warrant.

When this Court held that a warrant was required under the Fourth Amendment for civil health and safety code-inspections, the circumstances deemed appropriate for the warrant's issuance were different from the traditional requirements of probable cause for criminal searches. *Camara v. Municipal Court, supra,* 387 U.S. at 534-39. The *Camara* opinion makes clear that this was so for essentially two reasons. First, the Court agreed with the need for uniform periodic area inspections in order to "prevent even the unintentional development of conditions which are hazardous to public health and safety" *Camara v. Municipal Court, supra,* 387 U.S. at 535. The inspection program was "aimed at securing city wide compliance with minimum physical standards for private property... because fires and epidemics may ravage large urban areas. . . ." Id. Second, it was obvious that the kind of determination which would underlie the decision to enter a particular building was not susceptible of being made in terms of traditional probable cause. This was so because it was not any state of facts unique to the particular building which was thought to warrant the entry, but

13. It is well established, and does not necessitate lengthy argument, that once a warrant or valid consent is deemed required, the state may not condition the receipt of welfare benefits on a waiver of the recipient's Fourth Amendment protection. *Frost Trucking Co. v. R.R. Comm.*, 271 U.S. 583 (1926); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

rather the enforcement of a system of routine safety checks within a geographic area. Neither of these two considerations apply to welfare home visits.

The notion of general periodic inspections, undertaken without reference to the particularized circumstances of the person or home inspected, was thought in *Camera* to be acceptable in connection with enforcement of the health and safety codes for these reasons:

"First, such programs have a long history of judicial and public acceptance."[14] The same is not true for welfare home visits. The Social Security Act has only been in effect for about 35 years; during this time, Congress has never required or approved of the home visit. With the one exception of a control group within a simplified experimental method of determining eligibility, H.E.W. has not approved the home visit, *see* Part III *infra*. Finally, no court has ever approved the constitutionality of the warrantless home visit. *Parrish v. Civil Service Commission of the County of Alameda, supra; James v. Goldberg*, 302 F.Supp. 478 (S.D.N.Y. 1969), A. 119-137.

"Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results."[15] The home visit does not seek out conditions dangerous to health and safety. Its only asserted legitimate purpose is determination of eligibility, and the welfare department has not satisfactorily demonstrated that a periodic home visit is indispensable, or even essential to achievement of this purpose. *See* Part I, *supra* p. 6.

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14. *Camara v. Municipal Court, supra*, 387 U.S. at 537.
15. Id.

"Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[16] The impersonal search for conditions dangerous to health and safety cannot be compared to a home visit. The welfare recipient's whole way of life is open and subject to examination.[17] It is plain that whatever else the home visit may be, it is not impersonal. Further, as shown in *Parrish v. Municipal Court, supra,* and Part I *supra,* at pp. 7-9, the home visit is aimed at the discovery of evidence of crime, and evidence leading to welfare assistance forfeiture.[18]

Since each of these factors, the underpinnings for this Court's finding of reasonableness of periodic area code-enforcement inspections, is inapposite to welfare home visits, a periodic or areawide home visit is inherently unreasonable. Moreover, the purpose for the welfare home visit depends precisely upon the existence in the homes of individual welfare recipients of particularized circumstances, relevant to eligibility, which lend themselves to a traditional probable cause determination. Home visits are undertaken on the belief that a welfare recipient may have evidences of income rendering him ineligible for assistance, or ineligible for his present level of assistance; or on the belief that he may be otherwise guilty of welfare fraud, or guilty of legally actionable child neglect or abuse.

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16. Id.

17. Affidavits of Welfare Recipients, A.33-56; *See also* the purpose the welfare department asserts of safeguarding the morals and preserving the religion of children. Appellant Wyman's brief, p. 20.

18. *See also* the criminal overtones of 42 U.S.C. 602 (a)(16), A.110.

Such beliefs in regard to any individual welfare home are subject to testing by traditional standards of probable cause because—like any other assertions of particular reasons to search a particular place—they depend upon the reasonableness of inferences from known facts concerning what is likely to be found in that place.

There is every bit as much reason to require judicial testing of a social worker's inferences, as the inferences of a police officer. So the traditional determination of probable cause to support a warrant plays its traditional necessary function as applied to the welfare home visit, and should be constitutionally required. *See Parrish v. Civil Service Commission of the County of Alameda, supra.*

One special situation does appear to us to require minimal modification of the probable cause concept. When it is shown that visual verification in the home is absolutely essential, as for example verifying a client's request for a new mattress, the following circumstances can justify the warrant's issuance. First, an affirmative showing must be made that the item does not admit of any alternative means of verification, apart from the home visit. Second, the warrant must specify and be limited to the exact item or items to be viewed. And third, since traditional probable cause requirements are absent, and the warrant would not support a search for ineligibility or fraud, reasonable notice to the welfare recipient should be required. Only in this way will the legitimate interests of the welfare department be served with due regard and respect for the fundamental right of privacy of the welfare recipient.

In conclusion, we are sure that in a vast number of cases consent to the home visit will be given voluntarily; indeed, a visit may even be requested by the recipient. But

we see no compelling or valid reason here to lessen the Fourth Amendment protection for an entire class of poor persons.

III. A Binding and Valid H.E.W. Regulation Forbids States from Making Home Visits Without the Consent of the Welfare Recipient.

The Department of Health, Education and Welfare has promulgated regulations to curb the indignities occasioned by home visits:[19]

> The policies and procedures for taking applications and determining eligibility for assistance or other services will be consistent with program objectives; will respect the rights of individuals under the United States Constitution, the Social Security Act, Title VI of the Civil Rights Act of 1964, and all other relevant provisions of Federal and State laws; and will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights. [*Handbook of Public Assistance Administration,* Pt. IV, § 2200(a).]
>
> The [State] agency especially guards against violation of legal rights and common decencies in such areas as *entering a home by force, or without permission,* or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers, or papers, to seek clues to possible deception. (emphasis ours) [*Handbook of Public Assistance Administration,* Pt. IV, § 2300(a).]

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19. When a Federal law or regulation modifies or limits the operation of a practice, this does not mean approval of the practice. *Shapiro v. Thompson,* 394 U.S. 618, 639 (1969). Here the Federal limitations were occasioned by the abuses leading to *Parrish supra,* and other cases.

While H.E.W. regulations do not specially define consent or permission, public assistance administrators have been instructed to carefully consider case law definition.

> The simple presence or absence of words of permission or consent to certain procedures does not dispose of questions of law or propriety, as courts have frequently refused to give effect to purported consent where surrounding circumstances indicate that choice was not free. Therefore, the public assistance agency has a responsibility to be alert to avoid violation of either legal rights or common decencies. [*Handbook of Public Assistance Administration,* Pt. IV § 2400.]

Thus, while the federal regulation requiring consent to a home visit does not have the dimension of a constitutional guarantee, by promulgating § 2400, H.E.W. has shown its intent that the determination of consent is to be made by reference to the constitutional case law governing the issue of consent in search cases. It is well established case law that valid consent must be "unequivocal and specific,"[20] "freely and intelligently given,"[21] "voluntary,"[22] "and not given in response to duress or coercion actual or implied."[23] *See also Amos v. United States,* 255 U.S. 313, 317 (1921); *Johnson v. United States,* 333 U.S. 10, 13 (1948); *Bumper v. North Carolina,* 391 U.S. 543, 550 (1968).

In the welfare area, the threat of termination of benefits is exactly the kind of coercion that nullifies any legal effectiveness of apparent consent. *Parrish v. Civil Service Commission of the County of Alameda, supra,* 66 Cal.2d at 270-

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20. *Karwicki v. United States,* 55 F.2d 225, 226 (4th Cir. 1932).

21. *Kovach v. United States,* 53 F.2d 639 (6th Cir. 1931).

22. *Phelpher v. Decker,* 401 F.2d 232, 236 (5th Cir. 1968).

23. *Judd v. United States,* 190 F.2d 649, 651 (D.C. Cir. 1951); for a general discussion of the law of consent, *See United States v. Smith,* 308 F.2d 657, 663-4 (2d Cir. 1962).

272, 425 P.2d at 230-231. Nor can the receipt of welfare benefits be conditioned upon the waiver of a federal right. *McCulloch v. Maryland,* 17 U.S. 316 (1819); *Nash v. Florida Industrial Commission et al.,* 389 U.S. 235 (1967). A state "should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits ...." *Nash v. Florida Industrial Commission et al, supra,* 389 U.S. at 239. A right created by H.E.W. may not be avoided or conditioned by a state in any manner. *King v. Smith,* 392 U.S. 309 (1968), *Lewis v. Martin,* 25 L.Ed. 2d 561 (1970).

Appellants seem to accept the regulation, and others of H.E.W. as being mandatory and required (Appellant Wyman's brief, pp. 27-28.) Indeed, citing from the regulation they state: "Finally, this policy protects a client from an agency worker: 'entering a home by force, or without permission . . .'" (Appellant Wyman's brief, p. 28). We can only conclude that the welfare department misunderstood the regulation when they terminated benefits after consent to a home visit was refused.

Apart from the constitutional infirmities (discussed in Part I *supra*), if the federal government decides to change its policy somewhat, and require a home visit in a Quality Control System of an experimental Simplified Method for Determination of Eligibility (Appellant Wyman's brief, pp. 24-26) they may do so. The Federal government promulgated § 2300(a), and the Federal government can modify it; the state cannot. Apart from the Quality Control Group connected with the experimental program, home visits made without valid consent are prohibited and illegal.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

LOIS P. SHEINFELD
Attorney for The Legal Aid Society of San Mateo County

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,
Appellants,

v.

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York, *Appellants*,

v.

BARBARA JAMES, individually and on behalf of her minor child, Maurice James, and on behalf of all other persons similarly situated, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the district judge ordering the convening of a three-judge district court, date June 13, 1969, is reported at 302 F.Supp. 478. The decision of the three-judge court, dated August 18, 1969, is reported at 303 F. Supp. 935.

JURISDICTION

The decision of the three-judge district court granting appellee declaratory relief and a permanent injunction was entered on October 1, 1969. The notice of appeal was filed on December 20, 1969. Probable jurisdiction was noted by

this court on February 24, 1970. The jurisdiction of this court is conferred by 28 U.S.C. §1253 which provides for direct appeals of three judge courts.

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

The fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 N.Y.C.R.R., Section 351.10 provides as follows:

> 351.10 Required home visits and contacts. Social investigation as defined and described in sections 351.1 through 351.7, shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.
>
> (a) Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy.
>
> (b) The required home visit in the investigation of initial eligibility shall be made prior to the first grant of assistance *except*:
>
> (1) where there is emergent need and a presumption of eligibility. An emergency grant of home relief or veteran assistance or a preinvestigation grant in the federal categories may be made before the required home visit or the determination of eligibility. In such situations, the required home visit shall be made as in subdivision (a) above;

(2) where only one grant of assistance is required, as in the case of transients, the homeless, and other unusual situations in which field investigation is not feasible;

(3) where disasters or emergency situations, such as fire, flood, or weather conditions result in the loss of or temporary isolation of the home;

(4) where the need for public assistance coincides with termination of responsibility of another social or governmental agency for the applicant's maintenance. Under the usual procedure, presumptive eligibility for public assistance is substantiated prior to the person's application or immediate need for such assistance.

Title 18 N.Y.C.R.R., Section 351.21, provides as follows:

351.21 Required Contacts. Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence, reports on resources and other necessary documentation.

(a) *Required contacts and investigations.* Required contacts and investigations shall be made not less frequently than required by board rules (see Chapter I of this Title).

(b) *Required collateral contacts.* In addition to home visits and personal interviews with the recipient, there shall be contact, as the circumstances of the individual case indicate, with relatives, employers, and other appropriate persons and agencies by visits, interviews, correspondence, conferences and telephone.

(c) *Content and quality of contacts.* All contacts with recipients and with collateral sources of information shall, insofar as possible, be directed toward reconsideration of the following variable factors of eligibility:

(1) *Financial need.* The individual requirements of the recipients shall be reviewed in relation to

changes in the household, in living arrangements, in income, and in allowance schedules in order to determine those items of basic maintenance and/or special need that should be added, deleted or changed in amount.

(2) *Financial resources*. Current availability and use of financial resources shall be reconsidered in relation to fluctuations in value or income, or the initiation of termination of rights to benefits.

(3) *Employment, employability and training for employment*. The employment, potential employability or need for training or retraining of any employable person 16 years of age or over shall be considered.

(4) *Relatives*. Changes in circumstances, which affect the ability or willingness of relatives to assist the recipient either financially or in social planning, shall be reviewed. If a legally responsible relative is failing to support according to ability and/or court order, referral for appropriate legal action shall be considered.

(5) *Special categorical requirements*. There shall be review of factors of categorical eligibility which are subject to change, such as further impairment, recovery or improvement in the condition of an incapacitated parent or permanently and totally disabled person, return of an absent parent, termination of eligibility of children because of age or leaving school, and obtaining employment. In review of a home relief case, entitlement to assistance under a federally aided category shall be considered.

(6) *Health*. Changes in health conditions shall be considered with respect to continuing eligibility, amount of grant, and required services.

(7) *Services*. There shall be a review of need for services, progress in resolving specified problems and revision of social study.

QUESTIONS PRESENTED

1. Is the sanctity of a private home of recipients of aid to families with dependent children constitutionally protected from case workers forcing entry?

2. Are home visits by case workers conducted without the consent of the client and without a warrant, "unreasonable" intrusions prohibited by the Fourth Amendment, especially since liability to criminal prosecution may result?

3. May the receipt of welfare benefits be conditioned upon the recipient's waiver of Fourth Amendment rights?

STATEMENT OF CASE

Appellants, the New York Welfare Departments, require all applicants for public assistance to be visited in their homes. Once an applicant has been accepted for public assistance she is also required to submit to periodic home visits in order to continue to receive Welfare payments.

Barbara James has been a recipient of ADC benefits for the past two years. She and her only child, Maurice, age two years, reside in the City and State of New York.

On May 8, 1969, Appellee's caseworker, Adreanne Fennell, sent her a notice that she would visit Appellee at home on May 14, 1969. Appellee, upon receipt of this notice, telephoned and explained to her caseworker that she was ready, willing and able to discuss issues relevant to her continued receipt of public assistance. But Appellee refused to allow the caseworker to enter her home. The worker informed the Appellee that she was required by law to visit her in her home. Appellee insisted she would cooperate in any way in order to provide her with the information she requested, but she would not consent to the interview in the *privacy* of her home. The caseworker informed the Appellee that if she could not gain entry into her home to interview, then her public assistance would be terminated.

As a result, on May 13, 1969, the Department of Social Services sent Plaintiff a notice of intent to discontinue public assistance. On May 27, 1969, a prior review hearing was scheduled and completed. The decision of the prior review officer upheld the caseworker's determination that refusal to allow entry into the home was proper grounds for terminating assistance. On June 2, 1969, a notice of termination of assistance was then forwarded to Appellee.

Although Appellee's assistance was terminated because she refused entrance to her caseworker, numerous other recipients, reacting out of fear solely to the threats of termination or reduction of their assistance, have allowed caseworkers entry into their homes. (See Supplemental Affidavits A33-53 in Support of Plaintiff's Motion for Preliminary Injunction.) These people, with Barbara James, assert fear of future compelled entrance into their private homes.

This suit was commenced by order to show cause on June 6, 1969, and returnable on June 10, 1969, before the Honorable Charles Tenney. On June 13, 1969, a temporary restraining order was issued and a three-judge court convened to hear Plaintiff's motion for a preliminary injunction. The three-judge court was designated, consisting of Circuit Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit, and District Judge Edward C. McLean of the United States District Court for the Southern District of New York, in addition to Judge Charles Tenney of the District Court for the Southern District of New York. Oral argument was set and completed on June 30, 1969. On August 13, 1969, the Court, Judge McLean dissenting, rendered its written opinion holding the state policy unconstitutional. [A119] An appeal was taken to this Court with the request for a stay of the Injunction denied.

SUMMARY OF ARGUMENT

The family home is a particularly sacrosant legal entity under the Constitution, its tradition and case-law interpretation. Joining common law protections with rights of families and privacy, the law is very clear that access to homes is limited; in this case prohibited to welfare department officials.

Even if access were to be permitted, it would be a civil search. Such searches have to be constitutionally conducted with a warrant, which not being employed in New York are yet another ground of the invalidity of the home visits.

In making the receipt of welfare dependent on waiving Fourth Amendment rights New York attempts to impose an unconstitutional condition. This it may not do.

ARGUMENT

I

THE SANCTITY OF PRIVATE FAMILY HOMES DICTATES THAT NO GOVERNMENT OFFICIAL FROM THE WELFARE DEPARTMENT CAN ENTER THOSE HOMES WITHOUT THE RESIDENT'S PERMISSION.

The issue in this case is whether the State and its agents may compel their entrance into *family homes* for the claimed purposes of acting *in locis parentis*, verifying the legal status of Welfare recipients, and making criminal referrals. The Federal District Court decided, and Appellees here argue, that the family home represents a unique social and legal institution whose constitutional, traditional, and case law principles protect sanctity from invasion.

The Fourth Amendment to the Constitution explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Amendment functions to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of government officials, particularly in the private domain of their homes [A122].

This function harks back to ancient principles:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

This definition of sanctity was announced by William Pitt discussing entrance of government agents to exact an excise tax on cider. It is used as an explicit rationale by the Court in *Miller v. U.S.*, 357 U.S. 301 at 307 (1958). See also, *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 737-38 (1970). Appellees contend that their poor tenements are as important to them as to any man in his cottage. They assert the protection of the line of cases which hold that the sanctity of the home lies at the heart of Fourth Amendment protections and make clear that searches of private dwelling places will be subject to the most demanding judicial scrutiny. *Boyd v. U.S.*, 116 U.S. 616, 626-30 (1886), *Silverman v. U.S.*, 365 U.S. 505, 511 (1961).

But the Constitution does much more than affirm the sanctity of the home against search even where criminal activity is involved. This Court has explained how it has broadened that protected domain in the light of two complementary principles. First, the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization." *McDonald v. U.S.*, 335 U.S. 451 at 453 (1948). In *Griswold v. Connecticut*, 381 U.S. 479 (1965) the underlying ancient rights to privacy were once again reaffirmed to have continued vigor, major importance, and contemporary application. Said the Court (381 U.S. at 484):

> "The principles laid down in this opinion (*Entick v. Carrington*, 19 How. St. Tr. 1029) . . . affect the very essence of Constitutional liberty and security . . . [t]hey apply to all invasions on the part of government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense,

but it is the invasion of his indefensible right of personal security" quoting *Boyd v. U.S.*, 116 U.S. 616 at 630 (1886).

Invasions of the privacy of the home by government officials have been found to be the basis of tort actions. *Monroe v. Pape*, 365 U.S. 167, 190 (1961). The right to privacy is powerful enough to be put in the balance against First Amendment rights. Compare *Breard v. Alexandria*, 341 U.S. 622 (1951) with *Martin v. Struthers*, 319 U.S. 141 (1943). Only judicial scrutiny can decide the balances involved in making the permissible minor incursions into the privacy of the home: "When the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or governmental enforcement official." *Johnson v. U.S.*, 333 U.S. 10 at 14 (1948). See also *McDonald, supra.* at 455-56.

Second, amplifying the Fourth Amendment's guarantee of the sanctity of the home into the Constitutional right of privacy, this court, in *Griswold*, explicitly recognized its connection with another Constitutional right—that of the sanctity of the family. It has been said that: "[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Thus, parents can send children to schools of their religious choice or select a program of foreign languages, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Even child-labor laws can become difficult to justify because of the possible effects on the child-parent relationship, *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944). See also *Busey v. District of Columbia*, 129 F.2d 24 (D.C. Cir. 1942); *People v. Ewer*, 141 N.Y. 129, 36 N.E. 4 (1894). And, of course, patriotism and school boards notwithstanding, schools cannot compel flag salutes against parental wishes. *West Virginia v. Barnette*, 319 U.S. 624 (1943). Or prayers. *Engel v. Vitale*, 370 U.S. 421 (1962).

These parental rights necessitate the protection of the parent-child relationship through procedural guarantees. In *Armstrong v. Manzo*, 380 U.S. 545 (1965) a case dealing with adoption against a Father's wishes by his ex-wife's new husband this Court outlined the constitutional necessity for a hearing before that termination of parental rights. See also *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927). *May v. Anderson*, 345 U.S. 528 (1953).

Privacy, the primacy of the family, the unique nature and status of a family home all combine to protect appellee's home from unwanted entrance. Yet appellants seek to justify the intrusion by a startling new doctrine of law, which flies in the face of established precedent. For, in straining to take this case out of the overwhelming weight of precedent, appellants assert that once a family is accepted for public welfare, the welfare agency becomes primarily responsible for the child. (Juris Statement 17.) They would ask this Court to sanction the loss of the Fourth Amendment right to be free from search because appellees claim that receipt of public assistance results in the loss of parental rights protected by the Constitution!

To permit searches by appellants of anyone's family home on the theory of *in locis parentis*, be the home that of Judges or paupers, is clearly unconstitutional. It is particularly pernicious here since appellant's assertion, if taken at face value, would create two classes of parents, those with full parental rights to rear their children and those whose parental rights would be secondary to the power of the state to decide what is best for the child. The distinction between the two classes would be based solely upon the poverty of one class (and its dependence on Welfare). Such a scheme is constitutionally defective. *Harper v. Board of Elections*, 383 U.S. 663 (1966). See also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Needless to say, creating a separate class of individuals with diminished parental, privacy, and domestic rights solely because the family receives public welfare would violate basic equal protection guarantees. Welfare recipients have the same rights as other citizens,

Shapiro v. Thompson, 394 U.S. 618 (1969) and they may not be penalized for exercising them. See also *Sherbert v. Verner*, 374 U.S. 398 (1963). So, too appellants have the constitutional right to privacy and parenthood in an unscrutinized home and may not be penalized for asserting these constitutional rights.

II

WARRANTLESS SEARCHES OF HOMES, ABSENT AN EMERGENCY CRIMINAL SITUATION IS PROHIBITED BY THE FOURTH AMENDMENT.

The Appellees contend that mandatory routine home visits are never constitutionally permissible. But if this Court were to find that home visits were sometimes permissible the visits would have to be made with a warrant. Lacking that warrant, all civil home visits without consent are illegal searches.

Appellants want to search. They claim they want to verify special items, facts, even judge the morality and propriety of parental upbringing. As the District Court found, such entrance and looking is a search citing *Terry v. Ohio*, 392 U.S. 1, 17 n. 15 (1967). See also *Boyd v. U.S., supra.*

The searches conducted by caseworkers in this case comprise routine periodic searches of Welfare recipients' homes to check eligibility requirements.[1] These searches are always made without warrants. There is little question, that these periodic warrantless searches of welfare recipients' homes, had they been conducted by police officers would be held to violate Appellees' Fourth Amendment rights. The question in this context becomes then, whether the caseworker's

[1]See for general description of Welfare searches Note, 79 Yale L.J. 746 (1970). Note also that 42 USC 602(a) 10 requires all eligible applicants to be placed on the Welfare roster, yet to deny someone otherwise eligible payments because of refusal to allow entry is to add an extra illegal element of eligibility. *Cf Doe v. Shapiro*, 302 F. Supp. 761, 764 (D.Conn. 1969), *appeal dismissed*, 396 U.S. 488, *rehearing denied*, 397 U.S. 970 (1970).

periodic home visit, conducted without the issuance of a warrant, is immune from the prohibition against warrantless searches under the Fourth Amendment.

This Court has disposed of the issue of civil searches in *Camara v. San Francisco*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541(1967). (For emergency police powers for combatting crime, a subject outside this case and immensely complicated, see the lower court's opinion text and footnote at footnote 8, A. 134.)

In *Camara* and *See* searches by employees of a Health Department and Fire Department were held invalid where no search warrant was first obtained. Further, this Court has made clear in *Camara* and *See* that the Fourth Amendment's prohibition against unreasonable search would be applicable to an employee of a welfare department. *Camara, supra*, at 530-31. See, *supra*, at 543. The Court emphasized the public interest and concern in the governments conducting inspections of homes in urban population centers so that the minimum fire, housing and sanitation standards might be maintained. According to the Appellants, home visits are necessary only to aid in the determination of initial (N.Y.C.R.R. 351.10) and continuing (N.Y.C.R.R. 351.21) eligibility for public assistance. See also Goldberg Letter, [A59].

Any information which the Welfare Department seeks concerning continued eligibility can be obtained by interviews conducted at the local welfare center or at any other convenient locale. In short, if the Department needs information about the management of funds, or family composition (Goldberg Letter, A59), such information may be solicited without demanding forfeiture of constitutional rights, invasion of homes, and humiliation of individuals. The path least destructive of Constitutional rights is constitutionally mandated. See *Shelton v. Tucker*, 364 U.S. 479 (1960) and cites therein.

The case here presented is even easier to decide than *Camara* and *See*. For in *Camara* and *See* the issue still

stalks which determined *Frank v. Maryland*, 359 U.S. 360, 366 (1959)–the fear of rampaging fire or disease. It was claimed in these cases that persons may lose their lives, property may be destroyed–the time involved in securing warrants may cost lives with every second of delay created in obtaining them. Welfare recipients, on the other hand, object to regular warrantless home visits which can in no way be tied to the protection of public health and safety. Also *Camara* and *See* involve searches for particular dangerous items, not a generalized "fishing expedition". *A fortiori* the protections of the Fourth Amendment apply here.

On the other hand, welfare clients face a fear implicit in the visit that Frank, Camara and See did not–criminal prosectuion. See the statutes collected at footnote 5 of the *Amicus* brief from *San Mateo County* in conjunction with 42 U.S.C. 602(a)(16)(17)(18) (in N.Y. see 18 N.Y.C.R.R. 348 and NOLEO provisions A106). For examples of prosecutions which could result from such referrals, *People v. La Face*, 148 N.Y. Misc. 238, 266 N.Y.S. 458 (1933). See also, *People v. Pickett*, 19 N.Y. 2d 170 (1967), (Note also the implicit threat of filing neglect petitions which may lead to the loss of children. See Point I, *supra*). With this danger of criminal prosecution involved, with no conceivable immediacy of public health and safety emergencies, the reasons for insisting on warrants are even stronger than in *Camara* and *See* which established as a certainty the necessity of warrants for searches characterized as "administrative" by those seeking to invade and look into private homes. If Welfare families' homes are ever to be invaded it must be after issuance of warrants, conspicous only by their absence here.

"[T]he question is not whether the public interest justifies the type of search in question," *Camara v. San Francisco, supra*, at 533, but rather whether the governmental purposes New York seeks to achieve justified an exemption for welfare home visits from the

> one governing principle, justified by history and by current experience, [that] has consistently been followed: except in carefully defined classes of cases, a search of private property without proper consent

is 'unreasonable' unless it has been authorized by a valid search warrant. (*Camara v. Municipal Court, supra*, 387 U.S. at 528-29).

III

CONDITIONING THE RECEIPT OF WELFARE BENEFITS UPON THE WELFARE RECIPIENT'S WAIVER OF FOURTH AMENDMENT RIGHTS IS AN IMPOSITION OF AN UNCONSTITUTIONAL CONDITION.

There is no question but that a threat to terminate welfare payments unless entry is permitted is a coercive threat of Constitutional dimensions. This fact was recognized by this Court in *Lynumn v. Illinois*, 372 U.S. 528 (1963). That case involved the question of admissibility into evidence of an allegedly coerced confession. At the trial a police officer testified that when he entered petitioner's apartment:

> "I asked her who the clothing belonged to. She said they were her children's. I asked how many she had and she said 2. I asked her where they were or who took care of them. She said the children were over at the mother's or mother-in-law. I asked her how did she take care of herself and she said she was in ADC [Aid to Dependent Children]. I told her if we took her into the station and charged her with the offense, that the ADC [Aid to Dependent Children] would probably be cut off and also that she would probably lose custody of her children." 372 U.S. at p. 533.

After reciting this testimony, the Court concluded that the confession was coerced:

> "It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'" 372 U.S. at p. 534.

Although the coercion in *Lynumn* involved self-incrimination under the Fifth Amendment rather than unlawful search

under the Fourth, the principle involved is the same. Moreover, the close relationship between the Fourth Amendment and the self-incrimination provision of the Fifth Amendment in protecting one's privacy has long been recognized. See *Boyd v. United States, supra*; *Mapp v. Ohio*, 367 U.S. 643, 662 (1961) (concurring opinion of Mr. Justice Black). Particularly is this connection applicable when there are criminal overtones.

In the case at bar, the class leader, Barbara James, was told in every conceivable official way that unless she permitted the home visit her aid would be terminated. As the affidavits in this case demonstrate, that is a perpetual threat under which welfare families live.

This Court has laid to rest any doubts about the unconstitutionality of imposing such threats and conditions. For it is clear, that to force Plaintiff to choose between having her assistance terminated or consenting to a search of her home and the invasion of her privacy is to require a "choice between the rock and the whirlpool." *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967). See also *Spevack v. Klein*, 385 U.S. 511 (1967); *Nash v. Florida Industrial*, 389 U.S. 235, 239 (1967); *Sherbert v. Verner, supra*. Here welfare clients are faced not only with a loss of livelihood but the possible break-up of their family. Appellants here provide welfare recipients with the choice of giving up their right to bar government officials from their homes or forfeit their assistance payments. The consent to enter which is obtained in these circumstances could never be called consent by anyone. The loss of benefits poses an immediate threat to the health and well-being of the client and her children. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). The coercive effect could not be more obvious. The welfare recipient is at the discretionary mercy of the caseworker in a much larger and more meaningful sense than the private property owners who asserted their rights in *See* and *Camara*. The abuses which occur during the home visits arise precisely because of the inequality inherent in the relationship

between the recipient and the caseworker, due to the fact that the caseworker has the power and authority to deny, reduce or terminate benefits essential to the recipient's subsistence. Because of the inequality in position, it becomes difficult, if not impossible, for the recipient to even suggest that she has constitutional rights.

Let us note in passing, one more issue. This brief has mentioned privacy, the home and family sanctity. The Appellants suggest some type of *in locis parentis* role occurring by virtue of dispensation of Welfare funds. One duty of a caseworker is to treat all information received from a client as confidential. Yet, spread before this Court and the public eye are intimate details of the James family heretofore "confidential". What other details of the home itself the Welfare Department would choose to smear across its briefs are left only to the imagination of the theoretical guardians of "confidentiality". To be promised and then lose confidentiality after the claim of casework and its concommitant confidentiality is bought at the unwanted price of the loss of demanded constitutional rights is to have a promise "broken to the ear". Cf. *In Re Gault*, 387 U.S. 1 (1967).

Welfare recipients need welfare to survive. *Goldberg v. Kelly, supra.* They value their homes and family. To condition survival on the forfeiture of constitutional rights is itself unconstitutional.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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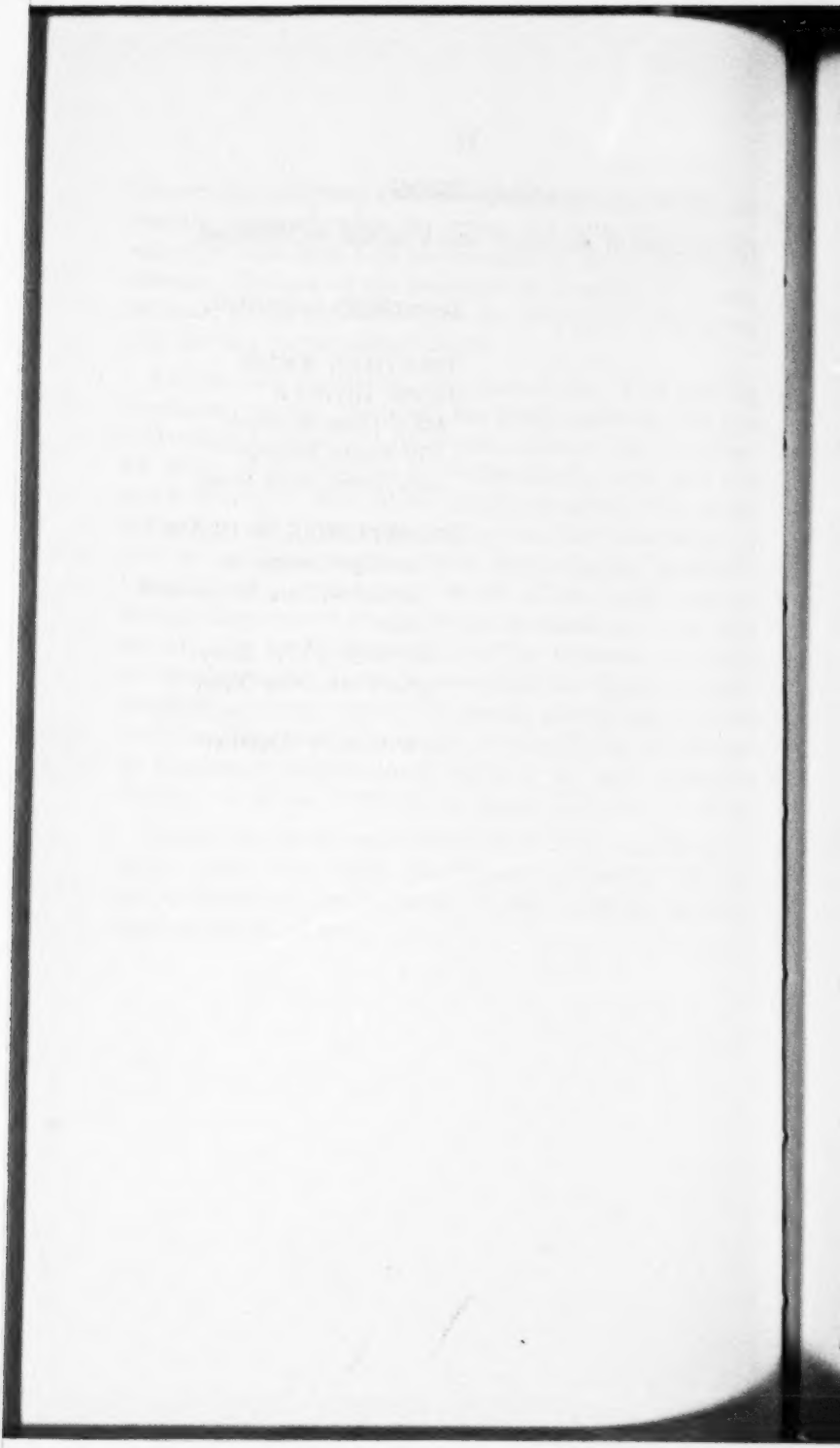

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

—against—

BARBARA JAMES, individually and on behalf of her minor child MAURICE JAMES, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE SOCIAL SERVICE EMPLOYEES UNION LOCAL 371, AFSCME, AFL-CIO, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 977

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services. JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

—against—

BARBARA JAMES, individually and on behalf of her minor child MAURICE JAMES, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE SOCIAL SERVICE EMPLOYEES UNION LOCAL 371, AFSCME, AFL-CIO, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Social Service Employees Union Local 371, AFSCME, AFL-CIO, is the sole and exclusive collective bargaining representative for the social service staff employed in the Department of Social Services of the City of New York. This staff comes under the direct super-

vision of Commissioner Jack R. Goldberg, a nominal appellant herein. The caseworkers, who are required to make the periodic home visits to recipients of Aid to Families with Dependent Children, which visits were found constitutionally defective by the Court below, form the principal component of the bargaining unit represented by the *Amicus* and patently will be directly and significantly affected by the outcome of this appeal.

This *Amicus* brief in support of Appellee James and the class she represents is prompted by the concern of the caseworkers and their union that the useless and demeaning practice of the mandatory non-consensual home visit be discontinued.

The parties have consented to the filing of an *amicus curiae* brief by the Social Service Employees Union Local 371. Copies of the letters evidencing these consents are filed with this brief.

Summary of Argument

The burden of the State's argument that the Fourth Amendment's requirement of a warrant should not be applied to the mandatory home visit rests on two premises, both factually insupportable: that the visit is indispensable both to the verification of eligibility for assistance and to the safeguarding of children's welfare. In fact the very utility of the mandatory home visit is questionable both in theory and practice. Further, the inherently degrading nature of the mandatory home visit requires its abandonment.

Argument

Appellant Wyman relies heavily on the assertion that the mandatory home visit "serves a host of compelling State interests," stating initially that "it serves to verify that all of the criteria of eligibility for assistance are met and to insure that funds are allocated only to eligible people and in the amounts necessary [and] it serves to insure that the welfare of the child is being safeguarded." (Appellant Wyman's brief, p. 13.) Subsequently, Appellant argues somewhat less forcefully that the home visit is merely "an *aid* in determining eligibility . . .," and "a *means* of assuring" proper allocation of funds to the children. (Appellant Wyman's brief, p. 19; emphasis ours.) It is the aim of this brief to demonstrate that, contrary to the State's assertions, the mandatory home visit does not possess the compensating values appellant has assigned to it.

POINT I

The mandatory home visit does not serve to insure the welfare of the child in an AFDC home.

The State argues convincingly that welfare children are "peculiarly susceptible to the hazards of life, to neglect and even abuse not necessarily for want of love, but for want of means." (Appellant Wyman's brief, p. 22.) Yet, the State then indulges in a *non sequitur* by suggesting* that welfare clients categorically are incapable of caring for their own children as a justification for the mandatory home visit of the caseworker every three months. More-

* For example, "Thus, the recently much discussed problems of child neglect and abuse are inherently more prevalent in assistance households . . . ." (Appellant Wyman's brief, p. 22.)

over, it ill behooves the State, which has recently reduced payments to welfare recipients, to rely upon the condition of poverty as the predicate for a non-consensual intrusion to protect the child from its fruits. See *Rosado* v. *Wyman*, —— U.S. ——, 38 U.S.L. Week 4266 (April 6, 1970). Indeed, there is something basically repugnant about the State's implicit and blanket indictment of welfare parents as prone to child neglect and abuse, and its not so subtle recitation of Mrs. James' child's injuries. (Appellant Wyman's brief, p. 22.) It is a truism that welfare clients are not a homogeneous group and the categorical approach to them is fundamentally dangerous.

In practice, welfare children are not protected and at best minimally served by the mandatory home visit. Initially, there is no requirement that a caseworker have any contact with the child when he visits the home, and if the child is of school age, it is highly unusual for the caseworker ever to see him during his daytime visit. (See generally, City of New York Department of Social Services, *Policies Governing the Administration of Public Assistance* (reissued 1967).)

The mandatory home visit usually is brief and sketchy. "Typically, . . . a worker will enter a client's apartment, remain standing with his coat on, and leave after a cursory discussion about the client's needs." Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. Rev. 836, 853 (1968). The emphasis of the visit is on eligibility.*

* The Moreland Commission described a typical visit:

"The caseworker diligently reviewed the information on the eligibility form, PA 101, with little discussion if any of the items. At one point, for instance, the man said that his father had died in New York City. He started to say they had gone to a ball game but the worker went on to the next item with-

Moreover, caseworkers are either badly trained or untrained, and even when given the opportunity to see a child during a visit, often miss discovering visible signs of neglect or abuse, e.g., malnutrition. *Report to the Moreland Commission, supra,* p. 81.

Not only is the substance of a mandatory home visit unproductive, but also the ability of a caseworker to utilize the home visit as a step to providing "child protective services" is severely circumscribed. Generally, a caseworker is not only poorly trained, but also young and inexperienced; there is a high turnover rate and this together with the constant shifting of clients and caseworkers from one caseload to another, results in unfamiliarity with individual families. A close and informed relationship between a caseworker and a client family is rarely established. COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES (transmitted by the U.S. Department of Health, Education and Welfare, and the New York State Department of Social Services), *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), pp. 51, 128 (hereinafter, *Report of Findings of Special Review*). In addition, the internal workload pressures from the Department of Social Services are inimical to the provision of any protective services.

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out waiting to hear any more of the account. At another point, the man said that he had got behind in meeting the payments on his many debts because of the emergency created when his sister was killed in an accident leaving two infants. Again the worker did not pause to hear anything about this family tragedy. Nevertheless, the worker's attitude was pleasant and non-judgmental, but entirely impersonal." Greenleigh Associates, Inc., *Report to the Moreland Commission on Welfare of Findings of the Study of the Public Assistance Program and Operation of the State of New York* (1962), pp. 51-52 (hereinafter, *Report to the Moreland Commission*).

"Caseloads are larger than they should be and paperwork consumes vast amounts of the workers' time. It appeared that the responsibilities of the workers were unreal, making it practically impossible for the workers to satisfactorily complete all the mandated duties. Three welfare commissioners concurred that an allocation of 50% of a worker's time to 'paper work' was unreasonable and tends to result in less time devoted to helping the clients." State of New York, *Public Welfare in Transition, Report of the Joint Legislative Committee to Revise the Social Services Law of New York State* (1969), p. 57 (hereinafter *Report of the Joint Legislative Committee*).

"The caseworkers interviewed said that the major portion of their time was spent reviewing eligibility, changing grants, changing addresses and reissuing, at least in part, lost or stolen assistance checks or money. Emergency services rendered at time of crisis in the family accounted for most of the service time." *Report of Findings of Special Review, supra,* at p. 113.

Staggeringly high caseloads carried by the individual caseworker render unsupportable the State's assertion that the caseworker assesses "total parental functioning and home conditions" and their effect upon the welfare child. (Appellant Wyman's brief, p. 20.) New York State's Joint Legislative Committee reports the following description from a welfare commissioner:

"It will be impossible to provide the needed social services to disadvantaged citizens unless the caseload for multi-problem families is reduced to 25 or 30. Most caseworkers are expected to care for all categories among their 70 cases. The typical load now

is about 35 Aid to Dependent Children cases, 20 Home Relief and 15 Old Age Assistance. Can you imagine the time a caseworker can give to one broken family consisting of a mother with perhaps 6 or more children each of whom has a services problem of health, or education or environment? Then multiply this by 10 or 20 or 30. . . ." *Report of the Joint Legislative Committee, supra,* pp. 57-58.*

The present experimentation with the affidavit system contradicts the notion that the mandatory home visit is actually relied upon to insure the welfare of the child. Under this program, the mandatory home visit is done away with in all but a small percentage of the cases, and in those cases remains only as a spot check. 45 C.F.R. Ch. 2, §205.20. If the mandatory home visit truly were relied upon by the State to protect a child from his parents, as the State insists in its brief, then the State could not countenance this new system where children are left entirely in the care of their own parents.

The decision of the Court below does not prevent the State from protecting the children; it merely requires that the Department of Social Services must have and demonstrate reasonable cause to believe that a problem exists before an invasion of the home will be permitted. Such a procedure is more likely to protect children, since caseworkers sent out with specific warrants would, in these

* Subsequent reorganization of the Department of Social Services has removed from the caseload those cases requiring the least attention, resulting in a parallel increase in multi-problem cases per caseload. In addition, the caseload itself has grown larger. In fact, the current contract with the *Amicus,* anticipating this situation, provides for monetary penalties to be paid caseworkers for excessive caseloads.

circumstances, be investigating precisely the safety and well-being of the children involved.

Consensual home visits would continue. Indeed, these visits may then become more effective: the social services work would be more intensive and clients choosing to avail themselves of these services, more receptive.*

POINT II

The mandatory home visit is ineffective and unnecessary for the verification of eligibility.

The mandatory home visit as a method of eligibility investigation has proved to be self-defeating,** and in fact

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* "Nothing is more debilitating, more conducive to 'giving up' than a sense of helplessness, of being the passive victim of circumstance.

"The history of the last few years indicates that any movement which gives people a sense of taking into their own hands the planning of and responsibility for their own lives leads to a diminution of the symptoms of decay." State of New York, *Report of the Joint Legislative Committee on Child Care Needs* (1968), p. 58.

** The Moreland Commission Report stated:

"The public welfare departments have an overconscientious concern with keeping off the rolls any who might by any technicality be considered to be ineligible. This precludes attention to those who could be rehabilitated and restored to self-care or self-support." Greenleigh Associates, Inc., *Report to the Moreland Commission on Welfare of Findings of the Study of the Public Assistance Program and Operation of the State of New York* (1962), p. 2.

The Joint Legislative Committee to Revise the Social Services Law of New York State held public hearings on eligibility determination:

"It was felt the determination of eligibility is an extremely complex, time consuming, and degrading process. Many of the participants were extremely critical of this process and

is ineffective in preventing or discovering ineligibility or fraud.

The study conducted for the House Committee on Ways and Means by the Department of Health, Education and Welfare and the New York State Department of Social Services demonstrates this. The study showed that 55.9%* of the families on AFDC either are ineligible under present requirements, are receiving more than they deserve, or are receiving less than they deserve. *Report of Findings of Special Review, supra,* p. 181, Table 2. The Comptroller General estimated that approximately $6.7 million per month in New York City alone was either spent or withheld improperly, and concluded:

> "Since the quality control system administered by NYSDSS did not alert responsible officials to the high rate of ineligibility found in the special review, GAO believes that changes in the quality control system are needed." *Report of Comptroller General, supra,* p. 3.

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said that, more than any other feature of the welfare programs, it is the determination of eligibility which causes much hostility between the worker and the clients. It was stated by several people that applicants for welfare are treated as if they all were trying to cheat the system and thus, are subjected to an excessively detailed investigation and verification of all of their statements. Such a process, according to the participants, is offensive, demeaning and dehumanizing." *Report of the Joint Legislative Committee, supra,* p. 60.

* The Comptroller General of the United States arrived at a figure of 59.7% in a concurrent study for the same House Committee, Committee on Ways and Means, U.S. House of Representatives (Comptroller General of the United States), *Report to the Committee on Ways and Means U.S. House of Representatives by the Comptroller General of the United States* (1969), p. 2 (hereinafter, *Report of Comptroller General*).

These figures and conclusion come as no surprise to those familiar with welfare administration and the nature of the mandatory home visit. The home visit simply is not reasonably related to the discovery of many forms of ineligibility or overpayment. One striking example is in the matter of rent determination.

The House Committee report found that "Rent errors frequently arose when the agency failed to verify the maximum amount legally set for a particular dwelling, and included for rent the amount actually paid. If the amount charged by the landlord exceeded the legal maximum, this was classed as an overpayment." *Report of Findings of Special Review, supra,* p. 182.

Perhaps the ultimate example of the irrelevance of the mandatory home visit to the verification of eligibility is that of Mrs. James, whose case record the State has chosen to bare for this Court. Until Mrs. James refused to admit her caseworker in May of 1969 she had been subjected to the ordinary number of mandatory home visits, yet the State admits on page 23 of its brief:

> *"Indeed,* appellee has never satisfactorily established her initial eligibility for assistance . . ." (emphasis ours).

In addition, the very safeguards cited by the State as protecting a client from an agency worker (Appellant Wyman's brief, p. 28), when observed, must, logically, hamper severely the ferreting out of fraud and ineligibility.*

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* The *Handbook of Public Assistance Administration* restrains caseworkers from:

In fact, the State itself admits that "Indeed, the home visit is not the chief, or even a significant means, of obtaining evidence of fraud (A. 115-116)." (Appellant Wyman's brief, p. 35.)

The State presently has at its disposal another, more efficient and less demeaning, method of eligibility determination—the affidavit system—which holds promise of better serving the public interest.

> "Evidence that 'red tape' strangles efficient operation is great. The Committee believes that given the enormous staff turnover, high cost of administration, poor and uneven quality of social services, that substitution of an 'affidavit' system to determine eligibility, rather than requiring individual verification in each case, would be more desirable and, in the long run, promote greater efficiency and even economy. In addition, it is less degrading and demeaning to the applicant. Such a system, with spot-checks used in a fashion similar to the Internal Revenue Service, would free staff to spend their time as counsellors and helpers rather than investigators. The public interest would be as well, and possibly better served, if more time were spent helping people on assistance get off the rolls, rather than in investigating them to make certain they should remain on assistance. Experimentation in New York City in two centers has shown a creditably low level of ineligibility using the affidavit

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"entering a home by force, or without permission, or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; and searching in the home, for example, in rooms, closets, drawers or papers, to seek clues to possible deception." *Handbook of Public Assistance Administration*, Part IV, §2300 (a).

approach." *Report from the Steering Committee of the Arden House Conference on Public Welfare* (appointed by Governor Rockefeller) (1968), p. 27.

Incidence of ineligibility under the affidavit system has not risen from that under the system of detailed investigation. The New York City Department of Social Services has stated in its official publication, *Welfarer,* that the affidavit system "determine(s) eligibility at least as effectively" as does the system of detailed investigation (including the mandatory home visit). *Welfarer,* Vol. 1, #5, Sept. 1969, at p. 2. In fact, a study by the City University of New York has concluded that if proper statistical methods were used to compare the data, ineligibility under the affidavit system would be lower than under the investigative system. The study also reported that most cases of ineligibility "were of a marginal or petty nature." Center for Social Research, Graduate Center, The City University of New York, *Evaluation of the Welfare Declaration: Eligibility Simplification for Public Assistance in Two Centers of the City of New York Department of Social Services,* p. 3.

Rather than dispense with the demeaning and demonstrably ineffective mandatory home visit system, the State seeks to justify the continuation of that system by referring to the "special grant" practice which it statutorily abandoned in 1969. (See Appellant Wyman's brief, p. 23.) Appellant cites *Rosado* v. *Wyman,* —— U.S. ——, 38 U.S.L. Week 4266 to imply the imminent return of special grants. However, this Court stated in that case:

> "Lest there be uncertainty we also reiterate that New York is not foreclosed from accounting for basic and

recurring items of need formerly subsumed in the special grant category by an averaging system like that adopted in the 1968 New York City experiment with cyclical grants." *Rosado* v. *Wyman*, —— U.S. ——, 38 U.S.L. Week at 4272.

POINT III

The mandatory home visit in design and effect is degrading to the welfare recipient.

The time has come to stop and consider the implications of a mandatory home visit. The State is doing more than simply invading the sanctity of the home; it is threatening a usurpation of the private lives of the individuals involved. The explicit language of 18 N.Y.C.R.R. §369.2(c) is evidence of the extent of this threatened invasion of privacy:

> "(c) *Welfare of child or minor.* A child or minor shall be considered to be eligible for ADC if his home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected. (1) In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation."

This kind of regulation when implemented by the mandatory home visit leads to the client's losing control of his own life.

> "Recipients become vulnerable not only to the punitive, moralistic official but also to the overzealous, well-intentioned but mistaken official, the social therapist who is certain that he knows what the client 'needs'." Handler and Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice,* 31 Law & Contemp. Prob. 377, 393 (1966).

The State has suggested that its procedural safeguards protect the dignity of the welfare client, but they hardly go to the root of the matter. Furthermore, these safeguards are not always observed by the caseworker, and enforcement is lax. Visits are supposed to be made by appointment, yet in practice this is not always done (see the affidavits of welfare recipients, Appendix pp. 33-56). The policy of the Department of Social Services on this matter was expressed by Jack R. Goldberg, Commissioner, in a letter dated April 11, 1969, attached to plaintiffs' supplemental memorandum in the Court below:

> "Caseworkers are encouraged . . . wherever . . . practicable to . . . send notice of such visits to recipients. However, failure to give such notice is not a valid basis of refusing admittance to the caseworker, and such refusal . . . will be considered a basis for . . . (consideration of discontinuance of recipient's funds)."

Only the worker himself judges whether the giving of notice is or is not "practicable". Obviously, an unexpected visit may well be inconvenient and embarrassing to the client.

Caseworkers, inexperienced and untrained though they may be, have considerable discretion as to the questions they ask and the extent of the investigation they make. (See generally, The City of New York Department of Social Services, *Policies Governing the Administration of Public Assistance* (reissued 1967).) Any violations of regulations they commit are likely to remain unreported and uncorrected, for the stance of the recipient is one of insecurity and financial dependency.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child, MAURICE JAMES, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT WYMAN

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REPLY BRIEF FOR APPELLANT WYMAN

A.

Although appellees and all of the *amici curiae* roundly condemn the home visit, each affirms, implicitly or directly, the power of the administrative agency to secure relevant

information about its applicants and recipients. (See Brief for Appellees [hereinafter Br.] p. 12; Brief for the Legal Aid Society of San Mateo County as *Amicus Curiae* [hereinafter San Mateo] p. 6; Brief for the Social Service Employees Union Local 371, AFSCME, AFL-CIO, *Amicus Curiae* [hereinafter Union] pp. 8-13; Brief *Amicus Curiae* of the National Welfare Rights Organization [hereinafter NWRO] p. 14.) Moreover, with one exception (Union, see *infra*, p. 6), not one of them denies that the home visit can furnish such relevant information. Notwithstanding this, it is contended "that mandatory routine home visits are never constitutionally permissible" (Br. p. 11).

The notion that an investigatory procedure closely related to an important interest can never be valid is scarcely "traditional and unquestionably proper Fourth Amendment Law" (San Mateo, p. 4). It is, instead, a unique constitutional doctrine the stated reasons for which in no way sustain it. First, it must be reiterated that a reasonable procedure is not made unreasonable because alternative methods of achieving the same end exist (Appellant's main brief [hereinafter Main brief] pp. 29-31). Second, the multiplication of possible "alternatives" in the various briefs merely highlights the fact that there is no substitute for direct personal observation. Thus, it is suggested that checking names on mailboxes is all that is necessary to verify technical eligibility criteria (San Mateo, p. 6, n. 4). Of course, there may be no mailboxes, there may be no names on the mailboxes and a name on a mailbox says nothing about who lives in the residence.

Similarly, the much-touted office visit (Br. p. 12), is no substitute. First, this is simply the declaration system presently in effect on a limited experimental basis (Main brief, pp. 24-27). Second, its dubious adequacy is easily revealed in the instant case where lack of candor and unwillingness to supply basic information has been a serious problem (Main brief, p. 23). Third, the office visit

tells little or nothing about the home in which the child is being raised. It provides only such information as the client wishes to provide and not necessarily such information as the agency must obtain to allocate money and services appropriately for the protection of the children involved.

It is at this child welfare aspect of the home visit that all parties balk most vehemently. The argument runs generally that the State is seeking to act in *loco parentis* for a specific class of children, that such classification is unreasonable and that, in any event, services are optional and may be rejected (Br. pp. 7-11; San Mateo, pp. 10-14; Union, pp. 4, 7; NWRO, pp. 12-14).

At the heart of this argument is the contention that, once a family has been identified as being in need of financial assistance, and such assistance is furnished, the family becomes indistinguishable from the general population with respect to the welfare of its children and the State has no greater interest in those children than in any others.

The argument overlooks one vital factor. The only purpose of the AFDC program, as it presently exists, is the welfare of children. Aid is not even furnished unless the family unit cannot survive without it. It is completely unreasonable, then, to say that the agency with which the adult client has sought and acquired a special relationship, has no interest in determining whether the aid it furnishes is needed, is adequate and is working. And the area in which it must work is the welfare of the children. The charge of paternalism which this concern draws down is a shibboleth intended to end argument. It does not support constitutional effacing of the direct responsibility which the agency has had placed upon it by the "caretaker relative" (NWRO, p. 4) and which it must take reasonable steps to discharge. There is general agreement that an adequate assistance program must furnish services as

well as money. It may be that the State can disown any responsibility for its agency to inquire into the minimal adequacy of the home and have the agency act simply as a conduit for funds. But to say that such a step is required by the constitution or by statute (*infra*, pp. 11-12), is erroneous and dismayingly shortsighted.

Nor does the argument gain validity from the contention that there is no requirement that the child be at home during the visit (NWRO, p. 10; Union, p. 4). The flaw in this absent child argument is clear. "The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility . . ." 18 N.Y.C.R.R. § 369.4(b)(1). Should the child be absent, and should the worker observing the home atmosphere feel that it is necessary to see the child, the worker can and must arrange to see him, in the home if need be. In this case, the child was not absent during home visits and, consequently, the issue did not arise.

However, a particularly grim but forceful example showing how a worker can act when a child is absent and showing, too, the necessity and value of the home visit to verify the adequacy of care in general has just come to light in New York. See N. Y. Times, Oct. 2, 1970, p. 20, col. 3.*

On September 29, 1970, a caseworker in the Bronx made a recertification visit to a household which she was informed consisted of a mother, a five-year-old boy, a three-year-old girl and a three and one-half-month-old baby girl. The worker had been assigned recently to the case and had never met the family. The family had not been visited for about six months (see A. 17).

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* The outline of this case was reported in the newspapers. We have filled in the details from information on file at the New York State Department of Social Services.

When the worker arrived at the home she found the mother and the oldest child. She noticed that the mother was an "obsessive" watcher of television and that her answers were "short" and "unresponsive". The mother did say that the infant was with its maternal grandparents on Staten Island and that the middle child was with a neighbor, but she could not or would not say which neighbor.

The household atmosphere sufficiently disturbed the caseworker so that she discussed it with her supervisor who suggested contacting the grandparents. A telephone call revealed that the infant was not with them. Thus alerted, the grandparents went to the household and brought the mother and oldest child to the local welfare center. The supervisor at the Center then called the police who discovered in the apartment the battred body of the infant and the starved body of the three-year-old. Both had been dead for at least a month.

Though extreme, this case demonstrates that it is far from unrealistic or unreasonable to use the home visit as a means to assess the ability of the head of the household to keep the household together. For if it cannot be kept together, despite financial assistance, the answer is not to "deny aid" to the child (NWRO, p. 4), but to change its nature. The fear enunciated by appellees that the home visit raises "the implicit threat of filing neglect petitions which may lead to the loss of children" (Br. p. 13) is an astonishing exaltation of the "privacy" of the mother over the welfare of the child. The home visit just described, if it did nothing else, raised the question of the adequacy of the home of the surviving child. See also *Matter of Efrain C.* (Fam. Ct.), N. Y. Law Journal, Sept. 16, 1970 (p. 21, col. 4) in which Judge Dembitz indicated that perhaps more frequent and not necessarily scheduled, home visits are in order.

Appellees further insist that one of the purposes of the home visit is "making criminal referrals" (Br. p. 7). No

case is cited to support a claim that this is true. Certainly there are statutes enabling prosecution for welfare fraud. However, these statutes apply to all aspects of such fraud and not just to what may be discovered during home visits. Yet these statutes are not even argued to bar investigation outside the home. Certainly the visit is not designed for that purpose (Main brief, pp. 27-29, 33-35). By contrast, in *Camara* v. *Municipal Court,* 387 U. S. 523, not only did refusal to permit entry result in criminal prosecution, but the violations for which the inspector was looking were crimes. *Id.* at 531. The attempt to equate the situation in *Parrish* v. *Civil Service Commission of the County of Alameda,* 66 Cal. 2d 260, 425 P. 2d 223 (1967), with the home visit (San Mateo, pp. 7-9), is wrong. The midnight invasion in that case was not a home visit in any sense of the word. It was a raid for criminal purposes and does not even remotely resemble the home visit. Should evidence of crime be uncovered, and prosecution result, the issue becomes one which can be dealt with at the criminal proceeding. See *United States* v. *Chikata,* 427 F. 2d 385, 390 (9th Cir. 1970).

Somewhat inconsistent with the position that the home visit may lead to criminal prosecution is the position taken by one *amicus curiae* that it leads to nothing at all (Union, *passim*). The basic reason for this is not that the home visit cannot be a useful tool, but that it is not because the visit is "brief and sketchy" (Union, p. 4), and workers are "not only poorly trained, but also young and inexperienced" (*id.* p. 5) and carry "[s]taggeringly high caseloads" (*id.* p. 6). If the members of Local 371 are incapable of doing their job, that is a disaster for agency and client. But the solution is not an irrevocable constitutional prohibition against conscientious and unskilled alike. Nor is the contention seemingly accurate either for New York City or for other caseworkers throughout the State and country. Indeed, this viewing with alarm is not justified by any of Mrs. James' caseworkers (Exh. 1 an-

nexed to complaint), or by the caseworker described above (pp. 4-5), or by a most recent example of a home visit which, again, epitomizes its reasonableness and constructive use.

In connection with the sample cases by which the experimental system of simplified eligibility was judged (Main brief, pp. 24-27), a home visit was made to a family in New York City with the following results:

> "B_____, J_____. . .
>
> Accepted on 12-19-69 because client stated her husband had deserted family in 10-69. The worker visited on 2-2-70 and found Mr. B_____ in the home and . . . earning $79.40 week net. Mrs. B_____ admitted to the worker that her husband had not deserted the family but has on occassion [sic] stayed out overnight when he gets drunk. There was a court hearing on 12-18-69 at which time the family was referred to marriage counselor. On 12-19-69, the Department authorized $370.45 for rent arrears and food. This was the only grant on this case and the case was closed 2-10-70 after the reviewer notified the Center that Mr. B_____ was in the home. Grant issued $370.45." (Report of the New York City Department of Social Services, April 15, 1970, forwarded to the Regional Commissioner of the Dept. of HEW, with respect to validation under SRS Program Regulation 10-3) (unpublished) (name and case number omitted).

This case history shows, first, that the home visit can verify eligibility where other methods are doubtful (in this case the method was declaration). It shows, second, that deliberate misrepresentation by a woman with a family who needs help of some sort is not handled by criminal prosecution or by ignoring the need for help. The result of this home visit was that appropriate help was provided and a grant for arrears made while an ineligible family

was not placed on the AFDC rolls. Thus, even the declaration system would be impaired if necessary home visits were constitutionally prevented.

This history also belies the contention (Union, p. 10; NWRO, p. 10), that since workers can neither force entry nor pry into closed places, their effectiveness is limited.* However, the possibility that there is concealed evidence of fraud is not the point. The home situation can be assessed for safety, adequacy and other factors of eligibility without such intrusion. (It might be noted that the claim that health and safety concerns are not factors in the home visit [San Mateo, p. 15], is inaccurate). Moreover, the case history above belies the argument that the home visit does not keep ineligible people off the rolls. This argument (Union, p. 8-12), in fact, is rendered meaningless by the asserted inability of the Local's members to function adequately. Finally, we have no idea what the number of ineligible recipients would be without even allegedly inadequate home visits.

B.

Aware perhaps of the forcefulness of the arguments in support of the home visit, appellees grudgingly allow that "if this Court were to find that home visits were sometimes permissible the visits would have to be made with a warrant" (Br. p. 11). The nature of the warrant desired is lamentably unspecific. It is suggested that it would be for a "civil home visit" (Br. p. 11). It is also suggested that it be on "traditional standards of probable cause" (San Mateo, p. 17), although even then, the problem of whether it would be for criminal charges only is left unanswered. It is not suggested by any brief that it could be issued simply because it was time for a home visit. Yet

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* This plaint of the inability to abuse the home visit highlights the fact that although appellees assert that "abuses" occur during such visits (Br. p. 15), they have yet to detail a single one.

any more specific warrant would change the nature of the visit, even though the periodic visit is reasonable, and a warrant based on time alone is unnecessary and inappropriate in this context (Main brief, pp. 36-40).

In fact, any warrant procedure, either as designed for civil inspection or for criminal purposes, is inapposite to the home visit situation. At least one *amicus* acknowledges the inapplicability of the civil inspection rationals as set forth in *Camara* v. *Municipal Court, supra* (San Mateo, pp. 15-16), but appears to insist on the criminal rationale, perhaps without a showing of criminal probable cause (*id.* pp. 16-17). However, this approach is simply another means of arguing that the periodic home visit is "inherently unreasonable" (*id.* p. 16). But, the inapplicability of *Camara* does not make the home visit unreasonable. It merely makes it unsuspectible to the rationale of that case.

In the first place, the home visit is not a search in the criminal sense or even in the *Camara* sense. Appellees' use of the word "search" (Br. p. 11), apparently in the mistaken belief that they must use it in order to claim the protection of the Fourth Amendment, obscures the facts. The home visit is essentially an interview coupled with observations of the home which enable the caseworker to assess those aspects of the home on which eligibility and extent of need are based. It involves urban and rural households, apartments and hotel rooms. It may result in protective services, new lodgings, repairs. It may result in no changes. But the congeries of factors involved in a meaningful home visit are not subject to isolation. In the case described above (pp. 4-5), no warrant could have issued for any isolated factor before, or even after, the home visit.

A warrant authorizes forcible entry. However, as the briefs point out, "entry by force, or without permission" is strictly forbidden. HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Pt. IV, § 2200(a). Any warrant would

be far more intrusive than the current practice. For, if permission to enter is denied, there is no entry, as there was none in this case and the Fourth Amendment does not even come into play. The question becomes, then, whether the consequences of a denial of entry so burden the exercise of the Fourth Amendment right of privacy as to be a violation of the right itself. The basic answer is, as we have said, that the reasonableness of the visit coupled with the inappositeness of the warrant negate any idea that a burden is created (Main brief, pp. 32-40).

Moreover, there already exist protections for the AFDC client which do as much, if not more than, the warrant procedure does in the criminal and civil inspection fields. These procedures are related to the nature of the rights and duties involved in the same way that warrant procedures protect people in the other fields.

In short, the final answer to the proposed superimposition of a warrant procedure on the home visit is the decision of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254. After that decision, termination of assistance cannot be the direct consequence of refusal to permit a home visit.

Should the refusal create an impasse between agency and client, the only direct consequence is a hearing. Such a hearing cannot be described as a "burden" any more than can a warrant procedure in the analogous cases relied on. This hearing is held not only prior to any termination of assistance but *prior* to *entry* into the home. Unlike a warrant application, which is *ex parte*, the hearing for the AFDC client provides a full opportunity to be heard before any decision is reached. Should the hearing result in a determination that the visit be made, the client's dignity is preserved by leaving open the option to permit the visit or terminate the relationship.* At the end of an *ex parte*

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* Of course, if there is any indication that the child's needs will be ignored or threatened by such termination, steps must be taken simultaneously to protect the child.

application for a warrant, the result may be authorization of a forced entry.

The administrative hearing officer can consider all aspects of the controversy taking account of any alleged abuses or fear of abuses the status of the determination of eligibility and the necessity for the visit. Only, then, in the face of blanket, arbitrary refusal to permit a necessary home visit, after a hearing, as in this case, would assistance be terminated. This is borne out by the fact that appellee, although she purports to represent a class, can point to no other case in which assistance has been terminated solely for refusal to permit a home visit and we are aware of none. The administrative hearing is thus a more than complete counterpart of the judicial hearing in cases where there is no continuing relationship between agency and party and for which judicial intervention is necessary to establish the need for and extent of that relationship (Main brief, pp. 37-38).

C.

The appellees and *amici curiae* assert several statutory arguments against the home visit.* First, it is argued that requiring compliance with the home visit requirement adds a new standard of eligibility (Br. p. 11, n. 1; NWRO, pp. 3-9). Compliance with the requirement that information be furnished is not a separate standard and to say that termination denies aid to "someone otherwise eligible" (*id.*), begs the question. The home visit furnishes necessary information about eligibility. If the information is not furnished, the agency cannot know if the applicant or recipient is eligible and cannot furnish assistance.

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* It was suggested to the District Court that the home visit requirement conflicted with federal statutes and regulations. However, these arguments were not detailed and the District Court never passed upon them. *Wyman* v. *Rothstein*, 398 U. S. 275; *Dandridge* v. *Williams*, 397 U. S. 471.

The cases relied on for this argument, *Doe* v. *Shapiro*, 396 U. S. 488; *Solmon* v. *Shapiro*, 396 U. S. 5 and *King* v. *Smith*, 392 U. S. 309, deal with extrinsic matters going to responsibility for child support. Neither suggests that the agency which accepts the responsibility cannot verify the need for and efficacy of assistance. In any event, the argument goes too far. For it would strike down any demand for verification as establishing an impermissible criterion of eligibility.

Finally, it is argued, that federal regulations expressly prohibit declining assistance for failure to permit a home visit (San Mateo, pp. 18-20; NWRO, pp. 10-11). On the contrary, those regulations require at least some home visits. Reliance is placed on the regulation prohibiting "entering a home by force, or without permission." *Handbook of Public Assistance Administration*, Pt. IV, §2200(a). The argument that entry under the "threat" of termination violates this regulation is unsound. The regulation which was meticulously observed in this case, in which no visit was made, obviously deals only with procedures to be employed in making home visits. It does not deal with whether or not such visits may be required. Indeed, the home visits, which are required for sample purposes by the federal government, are also governed by that regulation. Last, the home visit has long been part of the New York State plan and has yet to be disapproved by the Department of Health, Education and Welfare which promulgated the regulation relied on.

CONCLUSION

The decision below should be reversed and the complaint dismissed. In the alternative, the case should be remanded with instructions to hold a trial or to refer the appellee to her State remedies.

Dated: New York, New York, October 6, 1970

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REPLY BRIEF FOR APPELLEES

ARGUMENT

I

The reply brief for appellant Wyman suggests new factual issues in order to make three elementary claims: 1) that a visit to a recipient's home is among the best methods for

collecting information, 2) that home visits are an aid in neglect proceedings; 3) that requiring warrants is inappropriate in a welfare setting. These three claims do not bear up under critical analysis.

The appellant admits, as it must, that there are numerous methods available, other than mandatory home visits, for the welfare department to ascertain information necessary for the administration of their welfare program. Yet, the appellants claim that

> "a reasonable procedure is not made unreasonable because alternative methods of achieving the same end exist." (Reply Brief, p. 2)

Reasonableness is not the issue in this case. *Berger v. N.Y.* 388 U.S. 41 (1967); *Katz v. U.S.* 389 U.S. 347 (1967); *Byars v. U.S.* 273 U.S. 528 (1927). The appellant may debate, outside the Constitutional context, as to whether home visits are indeed useful. (See Union's *amicus.*) But, whether they serve any purpose at all is not determinative of the Constitutional question. The intrusion into the home is an act forbidden by the Constitution. Even if it were the sole method available of establishing facts, it would be Constitutionally suspect. The existence of "alternative methods of achieving the same end" necessitates a finding of Unconstitutionality, since whenever alternate methods of achieving the same end exist, the method least destructive of Constitutional rights must be employed. *Shelton v. Tucker,* 364 U.S. 479 (1960).

The appellants' reply brief relates a story of child abuse. Without a complete transcript of the judicial determination and findings of fact, it is impossible to tell, whether a home visit could have prevented or mitigated the abuse. It should be noted however, that neglect petitions can be issued on rather slender factual allegations. For example, the appellant (Reply Brief, p. 10) states that if a recipient should refuse a home visit, not only will the welfare payments be terminated, but the welfare department may consider "steps . . . to protect the child," i.e., the institution of neglect proceedings.

Appellant suggests that the right to a prior hearing means that a recipient can refuse a home visit without fear of loss of benefits as a "direct consequence" (Reply Brief pp. 10) of her refusal to allow a home visit. Mrs. James had such a prior hearing and was told her benefits would be cut off. The hearing officers (who are not attorneys), of course, only apply the regulations and, not trained in law, do not consider Constitutional questions. Therefore a prior hearing is but an internal review by the welfare agency where the recipient can choose between allowing the caseworker into her home or face termination of aid.

It may be true that by allowing government officials to place television cameras in every home, coupled with the power to force entry at any time, detection and prevention of crimes such as murder of a child or adult, or prevention and detection of health hazards or child abuse, would be greatly increased. True or not, these are devices which the Constitution forbids in order to preserve other Constitutional rights, such as the right of privacy and the sanctity of family life. Appellant does not assert that welfare clients are unique among the poor or, for that matter, among all the parents in neglecting or abusing children to a greater extent, nor could they, as there appears to be no such evidence in that regard. (Of course, the vast majority of neglect petitions do not speak to physical abuse but emotional climate and moral leadership.) To single out welfare clients as people who must submit to the intrusion of a home visit predicated upon fears of potential neglect violates equal protection. *Yick Wo vs. Hopkins*, 118 U.S. 356 (1886); *Harper vs. Board of Elections*, 383 U.S. 663 (1966). Moreover, there is no statutory or regulatory authority that the home visit is designed or could be designed as a child abuse protection procedure; rather this is a purpose now adduced by the State to justify unconstitutional intrusions. And in this justification, the State suggests the extent of arbitrary and humiliating demands that may be imposed upon a welfare family.

> "The worker can arrange to see [the child] in the home." (Page 4 of Appellants' brief)

The worker can also demand anything else that he or she feels necessary for judgment about "the welfare of the child" and ask in that home, in front of child and parents, questions that may be embarrasing and humiliating for both. "The welfare of the child" should not mean unlimited discretion by caseworkers to give orders and interrogate parents and children in their private homes. Appellees do not seek a broad decision as to the extent of the right of privacy of welfare clients that are so clearly threatened by the arbitrary powers of the caseworker. All they seek in this case is the one clear Constitutional protection they have—freedom from unwanted and unwarranted home visits.

Appellees do not admit that warrants would justify home visits. What they assert is that if home visits ever were to be allowed, the one minimum requirement would be warrants. The appellants attempt to distinguish between home visits and other searches made by warrants. Clearly, if a warrant procedure were established for welfare home visits, it would be a warrant procedure differing from other searches conducted by warrants by other agencies. As in *Camara v. San Francisco,* 387 U.S. 523 (1967), entry, of course, could not be made by force and, as in any procedure for warrants, the warrant must be based upon standards of what the appropriate objects of searches are and what external evidence leads to necessity for search. Cf. *Grau v. U.S.*, 287 U.S. 124 (1932); *Spinelli v. U.S.*, 393 U.S. 411 (1969); 19 ALR_3 727. The English system of civil warrants provides other examples. Food Drug ct., 1955 4 & 5, Eliz. 2c. H Sect $100_{(2)}$; Water Act 1948 11 & 12 6 c. 42 Section 48 (3) Clean Air Act, 1956, 4 & 5 Eliz. 2, c. 52 Section 31 and 32. In any event, the question of what type of warrants and procedures ought to be employed in conducting a welfare search is not before this Court. What is before this Court is the question of whether 1) home visits can ever be permitted when not desired by welfare clients; 2) if ever permitted, can they be allowed in the ab-

sence of a warrant. It is up to the welfare department, not this Court or appellants, to try to establish a warrant system if home visits are ever to be permitted with a warrant.

CONCLUSION

The decision below should be affirmed.

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Attorneys for Appellees

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* JAMES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 69. Argued October 20, 1970—Decided January 12, 1971

New York's Aid to Families with Dependent Children (AFDC) program, stressing "close contact" with beneficiaries, requires home visits by caseworkers as a condition for assistance "in order that any treatment or service tending to restore [beneficiaries] to a condition of self-support and to relieve their distress may be rendered and . . . that assistance or care may be given only in such amount and as long as necessary." Visitation with a beneficiary, who is the primary source of information to welfare authorities as to eligibility for assistance, is not permitted outside working hours, and forcible entry and snooping are prohibited. Appellee, a beneficiary under the AFDC program, after receiving several days' advance notice, refused to permit a caseworker to visit her home and, following a hearing and advice that assistance would consequently be terminated, brought this suit for injunctive and declaratory relief, contending that a home visitation is a search and, when not consented to or supported by a warrant based on probable cause, would violate her Fourth and Fourteenth Amendment rights. The District Court upheld appellee's constitutional claim. *Held:* The home visitation provided for by New York law in connection with the AFDC program is a reasonable administrative tool and does not violate any right guaranteed by the Fourth and Fourteenth Amendments. Pp. 5–17.

(a) Home visitation, which is not forced or compelled, is not a search in the traditional criminal law context of the Fourth Amendment. P. 8.

(b) Even assuming that the home visit has some of the characteristics of a traditional search, New York's program is reasonable, as it serves the paramount needs of the dependent child;

enables the State to determine that the intended objects of its assistance benefit from its aid and that state funds are being properly used; helps attain parallel federal relief objectives; stresses privacy by not unnecessarily intruding on the beneficiary's rights in her home; provides essential information not obtainable through secondary sources; is conducted, not by a law enforcement officer, but by a caseworker; is not a criminal investigation; and (unlike the warrant procedure, which necessarily implies criminal conduct) comports with the objectives of welfare administration. Pp. 8–15.

(c) The consequence of refusal to permit home visitation, which does not involve a search for violations, is not a criminal prosecution but the termination of relief benefits. *Camara* v. *Municipal Court*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541, distinguished. Pp. 15–16.

303 F. Supp. 935, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, and STEWART, JJ., and WHITE, J. (except for Part IV) joined. DOUGLAS, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1970

George K. Wyman, Individually and as Commissioner of the State of New York, Department of Social Services, et al., Appellant, *v.* Barbara James, Etc.	On Appeal From the United States District Court for the Southern District of New York.

[January 12, 1971]

Mr. Justice Blackmun delivered the opinion of the Court.

This appeal presents the issue whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC)[1] may refuse a home visit by the caseworker without risking the termination of benefits.

The New York State and City social services commissioners appeal from a judgment and decree of a divided three-judge District Court holding invalid and unconstitutional in application § 134 of the New York Social Welfare Law,[2] § 175 of the New York Policies Governing

[1] In *Goldberg* v. *Kelly*, 397 U. S. 254, 256 n. 1 (1970), the Court observed that AFDC is a categorical assistance program supported by federal grants-in-aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See New York Social Welfare Law §§ 343–362. Aspects of AFDC have been considered in *King* v. *Smith*, 392 U. S. 309 (1968); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Goldberg* v. *Kelly*, *supra*; *Rosado* v. *Wyman*, 397 U. S. 397 (1970); and *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

[2] "§ 134. Supervision

"The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact wtih persons granted public assistance and care. Such persons

the Administration of Public Assistance,[3] and §§ 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations,[4] and granting injunctive relief. *James*

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shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary . . . . The circumstances of a person receiving continued care shall be reinvestigated as frequently as the rules of the board or regulations of the department may require."

Section 134–a, as added by Laws 1967, c. 183, effective April 1, 1967, provides:

"In accordance with regulations of the department, any investigation or reinvestigation of eligibility . . . shall be limited to those factors reasonably necessary to insure that expenditures shall be in accord with applicable provisions of this chapter and the rules of the board and regulations of the department and shall be conducted in such manner so as not to violate any civil right of the applicant or recipient. In making such investigation or reinvestigation, sources of information, other than public records, shall be consulted only with the permission of the applicant or recipient. However, if such permission is not granted by the applicant or recipient, the appropriate public welfare official may deny, suspend or discontinue public assistance or care until such time as he may be satisfied that such applicant or recipient is eligible therefor."

[3] "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving . . . Aid to Dependent Children . . . ."

[4] "Section 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

"a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy . . . ."

"Section 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and

v. *Goldberg*, 303 F. Supp. 935 (SDNY 1969). This Court noted probable jurisdiction but, by a divided vote, denied a requested stay. 397 U. S. 904.

The District Court majority held that a mother receiving AFDC relief may refuse, without forfeiting her right to that relief, the periodic home visit which the cited New York statutes and regulations prescribe as a condition for the continuance of assistance under the program. The beneficiary's thesis, and that of the District Court majority, is that home visitation is a search and, when not consented to or when not supported by a warrant based on probable cause, violates the beneficiary's Fourth and Fourteenth Amendment rights.

Judge McLean, in dissent, thought it unrealistic to regard the home visit as a search; felt that the requirement of a search warrant to issue only upon a showing of probable cause would make the AFDC program "in effect another criminal statute" and would "introduce a hostile arm's length element into the relationship" between worker and mother, "a relationship which can be effective only when it is based upon mutual confidence

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shall include home visits, office interviews, correspondence, reports on resources and other documentation."

Section 369.2 of Title 18 provides in part: "(c) *Welfare of child or minor.* A child or minor shall be considered to be eligible for ADC if this home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected. (1) In determining the ability of a parent or relative to care for the child so that this purpose is achieved, the home shall be judged by the same standards as are applied to self-maintaining families in the community. When, at the time of application, a home does not meet the usual standards of health and decency but the welfare of the child is not endangered, ADC shall be granted and defined services provided in an effort to improve the situation. Where appropriate, consultation or direct service shall be requested from child welfare."

and trust"; and concluded that the majority's holding struck "a damaging blow" to an important social welfare program. 303 F. Supp., at 946.

I

The case comes to us on the pleadings and supporting affidavits and without the benefit of testimony which an extended hearing would have provided. The pertinent facts, however, are not in dispute.

Plaintiff Barbara James is the mother of a son, Maurice, who was born in May 1967. The reside in New York City. Mrs. James first applied for AFDC assistance shortly before Maurice's birth. A caseworker made a visit to her apartment at that time without objection. The assistance was authorized.

Two years later, on May 8, 1969, a caseworker wrote Mrs. James that she would visit her home on May 14. Upon receipt of this advice, Mrs. James telephoned the worker that, although she was willing to supply information "reasonable and relevant" to her need for public assistance, any discussion was not to take place at her home. The worker told Mrs. James that she was required by law to visit in her home and that refusal to permit the visit would result in the termination of assistance. Permission was still denied.

On May 13 the City Department of Social Services sent Mrs. James a notice of intent to discontinue assistance because of the visitation refusal. The notice advised the beneficiary of her right to a hearing before a review officer. The hearing was requested and was held on May 27. Mrs. James appeared with an attorney at that hearing.[5] They continued to refuse permission for

[5] No issue of procedural due process is raised in this case. Compare *Goldberg* v. *Kelly*, *supra*, 397 U. S. 254 (1970), and *Wheeler* v. *Montgomery*, 397 U. S. 280 (1970).

a worker to visit the James home, but again expressed willingness to cooperate and to permit visits elsewhere. The review officer ruled that the refusal was a proper ground for the termination of assistance. His written decision stated:

> "The home visit which Mrs. James refuses to permit is for the purpose of determining if there are any changes in her situation that might affect her eligibility to continue to receive Public Assistance, or that might affect the amount of such assistance, and to see if there are any social services which the Department of Social Services can provide to the family."

A notice of termination issued on June 2.

Thereupon, without seeking a hearing at the state level, Mrs. James, individually and on behalf of Maurice, and purporting to act on behalf of all other persons similarly situated, instituted the present civil rights suit under 42 U. S. C. § 1983. She alleged the denial of rights guaranteed to her under the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Fourteenth Amendments, and under Subchapters IV and XVI of the Social Security Act and regulations issued thereunder. She further alleged that she and her son have no income, resources, or support other than the benefits received under the AFDC program. She asked for declaratory and injunctive relief. A temporary restraining order was issued on June 13, *James* v. *Goldberg*, 302 F. Supp. 478 (SDNY 1969), and the three-judge District Court was convened.

II

The federal aspects of the AFDC program deserve mention. They are provided for in Subchapter IV, Part A, of the Social Security Act of 1935, 49 Stat. 620, as amended, 42 U. S. C. §§ 601–610. Section 401 of the

Act, 42 U. S. C. § 601, specifies its purpose, namely, "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life . . . ." The same section authorizes the federal appropriation for payments to States which qualify. Section 402, 42 U. S. C. § 602, provides that a state plan, among other things, must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness"; must "provide that the State agency will make reports. . . . as the Secretary [of Health, Education, and Welfare] may from time to time require"; must "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid"; and must "provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State. . . ." Section 405, 42 U. S. C. § 605, provides that

> "Whenever the State agency has reason to believe that any payments of aid . . . made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative . . . in order to assure use of such payments in the best

interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments . . . or in seeking the appointment of a guardian . . . or in the imposition of criminal or civil penalties . . . ."

III

When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home. "The right of the people to be secure in their persons, houses, papers, and effects . . . ." This Court has characterized that right as "basic to our free society." *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949); *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967). And over the years the Court consistently has been most protective of the privacy of the dwelling. See, for example, *Boyd* v. *United States*, 116 U. S. 616, 626–630 (1886); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Chimel* v. *California*, 395 U. S. 752 (1969); *Vale* v. *Louisiana*, 399 U. S. 30 (1970). In *Camara* MR. JUSTICE WHITE, after noting that the "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task," went on to observe,

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U. S., at 528–529.

He pointed out, too, that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior. 387 U. S., at 530.

IV

This natural and quite proper protective attitude, however, is not a factor in this case, for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. It is also true that the caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context. We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

V

If however, we were to assume that a caseworker's home visit, before or subsequent to the beneficiary's initial qualification for benefits, somehow (perhaps because the average beneficiary might feel she is in no position to refuse consent to the visit), and despite its interview nature, does possess some of the characteristics of a search in the traditional sense, we nevertheless conclude that the visit does not fall within the Fourth Amend-

ment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard. *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). And Mr. Chief Justice Warren observed in *Terry* that "the specific content and incidents of this right must be shaped by the context in which it is asserted." 392 U. S., at 9.

There are a number of factors which compel us to conclude that the home visit proposed for Mrs. James is not unreasonable:

1. The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.

2. The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.

3. One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might

well expect more, because of the trust aspect of public funds, and the recipient, as well as the caseworker, has not only an interest but an obligation.

4. The emphasis of the New York statutes and regulations is upon the home, upon "close contact" with the beneficiary, upon restoring the aid recipient "to a condition of self-support," and upon the relief of his distress. The federal emphasis is no different. It is upon "assistance and rehabilitation," upon maintaining and strengthening family life, and upon "maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." 42 U. S. C. § 601; *Dandridge* v. *Williams*, 397 U. S. 471, 479 (1970), and MR. JUSTICE MARSHALL dissenting at 510. It requires cooperation from the state agency upon specified standards and in specified ways. And it is concerned about any possible exploitation of the child.

5. The home visit, it is true, is not required by federal statute or regulation.[6] But it has been noted that the visit is "the heart of welfare administration"; that it affords "a personal, rehabilitative orientation, unlike that of most federal programs"; and that the "more pronounced service orientation" effected by Congress with the 1956 amendments to the Social Security Act "gave redoubled importance to the practice of home visiting. . . ." Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L. J. 746, 748 (1970). The home visit is an established routine in States other than New York.[7]

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[6] The federal regulations require only periodic redeterminations of eligibility. HEW Handbook of Public Assistance Administration, pt. IV, § 2200 (d). But they also require verification of eligibility by making field investigations "including home visits" in a selected sample of cases. Pt. II, § 6200 (a) (3).

[7] See *e. g.*, Ark. Stat. 83–131 (1968); Ala., Manual for Administration of Public Assistance, pt. I–8 (B) (1968 rev.); Ariz., Regu-

6. The means employed by the New York agency are significant. Mrs. James received written notice several days in advance of the intended home visit.[8] The date was specified. Section 134–a of the New York Social Welfare Law, effective April 1, 1967, and set forth in n. 2, *supra,* sets the tone. Privacy is emphasized. The applicant-recipient is made the primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden. HEW Handbook of Public Assistance Administration, Part IV, §§ 2200 (a) and 2300; 18 N. Y. C. R. R. §§ 351.1, 351.6, and 351.7.

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lations promulgated pursuant to Revised Statute § 46–203, Reg. 3–203.6 (1968); Cal. State Dept. of Social Welfare Handbook, C–012.50 (1964); Colo. c. 119, Art. 9, C. R. S. 1963 (1967 Supp.), as amended c. 279 Session Laws, 1969; Fla. Public Assistance c. 100; Ga. Division of Social Administration—Public Assistance Manual, pt. III, § V (D)(2), pt. VIII (A)(1)(b) (1969); Ill. Stat. Public Aid Code 23 §§ 4–7; Ind. Stat. 52–1247, Dept. Pub. Welfare, Rules & Regs., Reg. 2–403 (1965); Mich. Public Assistance Manual, Item 243 (3)(F) (Rev.) (1967); Miss. Code 1942 § 7177 (Laws of 1940 c. 294); Mo. Public Assistance Manual, Dept. of Welfare, § III (1969); Nebraska, State Plan and Manual Regulations, pt. IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, pt. II, §§ 2120, 2122 (1969); N. M. Public Welfare Act, 13–1–13, Health and Social Services Dept. Manual, §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV (D)(2); S. Dak. L. 1967, 28–7–7 (formerly SDC 1960 Supp. 55.3805); Tenn. Code Ann. 14–301 *et seq.* 37–309, Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wisc. Public Assistance Law § 49.19 (2).

[8] It is true that the record contains 12 affidavits, all essentially identical, of aid recipients (other than Mrs. James) which recite that a caseworker "most often" comes without notice; that when he does, the plans the recipient had for that time cannot be carried out; that the visit is "very embarrassing to me if the caseworker comes when I have company"; and that the caseworker "sometimes asks very personal questions" in front of children.

All this minimizes any "burden" upon the homeowner's right against unreasonable intrusion.

7. Mrs. James, in fact, on this record presents no specific complaint of any unreasonable intrusion of her home and nothing which supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity. She complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind. She alleges only, in general and nonspecific terms, that on previous visits and, on information and belief, on visitation at the home of other aid recipients, "questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility." Paradoxically, this same complaint could be made of a conference held elsewhere than in the home, and yet this is what is sought by Mrs. James. The same complaint could be made of the census taker's questions. See MR. JUSTICE MARSHALL's opinion, as United States Circuit Judge, in *United States* v. *Rickenbacker*, 309 F. 2d 462 (CA2 1962), cert. denied, 371 U. S. 962. What Mrs. James appears to want from the agency which provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.[9]

[9] We have examined Mrs. James' case record with the New York City Department of Social Services, which, as an exhibit, accompanied defendant Wyman's answer. It discloses numerous interviews from the time of the initial one on April 27, 1967, until the attempted closing in June 1969. The record is revealing as to Mrs. James' failure ever really to satisfy the requirements for eligibility; as to constant and repeated demands; as to attitude toward the

8. We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. 303 F. Supp., at 943. Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits,[10] or of impending medical needs. And, of course, little children, such as Maurice James, are not yet registered in school.

9. The visit is not one by police or uniformed authority. It is made by a caseworker of some training [11] whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. As has already been stressed, the program concerns dependent children and the needy families of those children. It does not deal with crime or with the actual or suspected perpetrators

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caseworker; as to reluctance to cooperate; as to evasiveness; and as to occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.

[10] Section 406 (a) of the Social Security Act, as amended, 42 U. S. C. § 606 (a); § 349.B.1. of the New York Social Welfare Law.

[11] The *amicus* brief submitted on behalf of the Social Services Employees Union Local 371, AFSCME, AFL–CIO, the bargaining representative for the social service staff employed in the New York City Department of Social Services, recites that "caseworkers are either badly trained or untrained" and that "[g]enerally, a caseworker is not only poorly trained, but also young and inexperienced . . . ." Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty.

of crime. The caseworker is not a sleuth but rather, we trust, is a friend in need.

10. The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James and those who would join her, is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow,[12] then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.

11. The warrant procedure, which the plaintiffs appear to claim to be so precious to them, even if civil in nature, is not without its seriously objectionable features in the welfare context. If a warrant could be obtained (the appellees afford us little help as to how it would be obtained), it presumably could be applied for *ex parte*, its execution would require no notice, it would justify entry by force, and its hours for execution[13] would not be so limited as those prescribed for home visitation. The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that it would have to rest upon probable cause, and probable cause in the welfare context, as Mrs. James concedes, requires more than the mere need of the caseworker to see the

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[12] See, for example, New York Social Welfare Law § 145.

[13] New York Code Crim. Proc. § 801.

child in the home and to have assurance that the child is there and is receiving the benefit of the aid which has been authorized for it. In this setting the warrant argument is out of place.

It seems to us that the situation is akin to that where an Internal Revenue Service agent, in making a routine civil audit of a tapayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his "rights" in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making. So here Mrs. James has the "right" to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitiude is involved.

VI

Camara v. *Municipal Court, supra,* 387 U. S. 523 (1967), and its companion case, *See* v. *City of Seattle,* 387 U. S. 541 (1967), both by a divided Court, are not inconsistent with our result here. Those cases concerned, respectively, a refusal of entry to city housing inspectors checking for a violation of a building's occupancy permit, and a refusal of entry to a fire department representative interested in compliance with a city's fire code. In each case a majority of this Court held that the Fourth Amendment barred prosecution for refusal to permit the desired warrantless inspection. *Frank* v. *Maryland,* 359 U. S. 360 (1959), a case which reached an opposing result and which concerned a request by a

health officer for entry in order to check the source of a rat infestation, was *pro tanto* overruled. Both *Frank* and *Camara* involved dwelling quarters. *See* had to do with a commercial warehouse.

But the facts of the three cases are significantly different from those before us. Each concerned a true search for violations. *Frank* was a criminal prosecution for the owner's refusal to permit entry. So, too, was *See*. *Camara* had to do with a writ of prohibition sought to prevent an already pending criminal prosecution. The community welfare aspects, of course, were highly important, but each case arose in a criminal context where a genuine search was denied and prosecution followed.

In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. Her wishes in that respect are fully honored. We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits. If a statute made her refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* and *See* would have conceivable pertinency.

VII

Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early morning mass raid upon homes of welfare recipients is not unknown. See *Parrish* v. *Civil Service Commn.*, 66 Cal. 2d 260, 425 P. 2d 223 (1967); Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347 (1963). But

that is not this case. Facts of that kind present another case for another day.

We therefore conclude that the home visitation as structured by the New York statutes and regulations is a reasonable administrative tool; that it serves a valid and proper administrative purpose for the dispensation of the AFDC program; that it is not an unwarranted invasion of personal privacy; and that it violates no right guaranteed by the Fourth Amendment.

Reversed and remanded with directions to enter a judgment of dismissal.

It is so ordered.

MR. JUSTICE WHITE concurs in the judgment and joins the opinion of the Court with the exception of Part IV thereof.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1970

George K. Wyman, Individually and as Commissioner of the State of New York, Department of Social Services, et al., Appellant, v. Barbara James, Etc.	On Appeal From the United States District Court for the Southern District of New York.

[January 12, 1971]

Mr. Justice Douglas, dissenting.

We are living in a society where one of the most important forms of property is government largesse which some call the "new property."[1] The payrolls of government are but one aspect of that "new property." Defense contracts, highway contracts, and the other multifarious forms of contracts are another part. So are subsidies to air, rail, and other carriers. So are disbursements by government for scientific research.[2] So are TV and radio licenses to use the air space which of course is part of the public domain. Our concern here is not with those subsidies but with grants that directly or indirectly implicate the *home life* of the recipients.

In 1969 roughly 126 billion dollars were spent by the federal, state, and local governments on "social welfare."[3] To farmers alone, whose numbers totalled 128,987, nearly four billion was paid, in part for not growing certain crops.[4] Those payments were in some instances very

[1] See Reich, The New Property, 73 Yale L. J. 733, 737–739.

[2] See Ginsberg, What Science Policy? Columbia Forum, Fall 1970, p. 12.

[3] See Appendix I to this opinion.

[4] See Appendix II to this opinion.

large, a few running a million or more a year. But the majority were payments under $5,000 each.

Yet almost every beneficiary whether rich or poor, rural or urban, has a "house"—one of the places protected by the Fourth Amendment against "unreasonable searches and seizures."[5] The question in this case is whether receipt of largesse from the government makes the *home* of the beneficiary subject to access by an inspector of the agency of oversight, even though the beneficiary objects to the intrusion and even though the Fourth Amendment's procedure for access to one's *house* or *home* is not followed. The penalty here is not, of course, invasion of the privacy of Barbara James, only her loss of federal or state largesse. That, however, is merely rephrasing the problem. Whatever the semantics, the central question is whether the government by force of its largesse has the power to "buy up" rights guaranteed by the Constitution.[6] But for the assertion of her constitutional right, Barbara James in this case would have received the welfare benefit.

We spoke in *Speiser* v. *Randall*, 357 U. S. 513, of the denial of tax exemptions by a State for exercise of First Amendment rights.

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. . . . To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its

[5] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] See 73 Harv. L. Rev. 1595, 1599.

deterrent effect is the same as if the State were to fine them for this speech." *Id.*, at 518.

Likewise, while second-class mail rates may be granted or withheld by the government, we would not allow them to be granted "on condition that certain economic or political ideas not be disseminated." *Hannegan* v. *Esquire*, 327 U. S. 146, 156.

In *Sherbert* v. *Verner*, 374 U. S. 398, a State providing unemployment insurance required recipients to accept suitable employment when it became available or lose the benefits. An unemployed lady was offered a job requiring her to work Saturdays but she refused because she was a Seventh Day Adventist to whom Saturday was the Sabbath. The State cancelled her unemployment benefits and we reversed, saying:

"The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

"Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.*, at 404, 406.

These cases are in the tradition of *United States* v. *Chicago M. St. P. & PR Co.*, 282 U. S. 311, 328–329,[7] where Mr. Justice Sutherland, writing for the Court said:

> ". . . the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.*, at 328–329.[8]

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[7] And see Hale, Unconstitutional Conditions and Constitutional Rights, 35 Col. L. Rev. 321 (1935); *Frost & Frost Co.* v. *Railroad Commission*, 271 U. S. 583, 594.

[8] *Fleming* v. *Nestor*, 363 U. S. 603, is not in accord with that tradition. There we upheld the right of Congress to strip away accrued social security benefits. Nestor, an alien, came to this country in 1913. From the enactment of the Social Security Act until 1955 Nestor and his employers contributed payments to the fund. In 1955 Nestor became eligible for old-age benefits. One year later he was deported for having been a member of the Communist Party between 1933 and 1939—a time when it was perfectly legal to be a member. In 1954 Congress passed a law which provided for the loss of social security benefits for anyone deported for having been a member of the Communist Party. Like the law providing for deportation for membership this law, too, was fully retroactive. Thus Nestor was deported after he had retired based on a law condemning membership in the Communist Party at the time when it was legal to be a member, and stripped of his retirement income based on a law which was triggered by that deportation. We upheld the constitutionality of the 1954 law by a 5–4 majority.

The majority stated Nestor's property had not been taken without due process because Nestor had no property rights; his interest was "non-contractual" and could "not be soundly analogized to that of the holder of an annuity." 363 U. S., at 609–610. The majority then went on to hold social security benefits were only protected from congressional action which is "utterly lacking in rational justification." *Id.*, at 611.

If it was unconstitutional in *Speiser* to condition a tax exemption on a limitation on freedom of speech, it was equally unconstitu-

What we said in those cases is as applicable to Fourth Amendment rights as to those of the First. The Fourth, of course, speaks of "unreasonable" searches and seizures, while the First is written in absolute terms. But the right of privacy which the Fourth protects is perhaps as vivid in our lives as the right of expression sponsored by the First. *Griswold* v. *Connecticut*, 381 U. S. 479, 484. If the regime under which Barbara James lives were enterprise capitalism as, for example, if she ran a small factory geared into the Pentagon's procurement program, she certainly would have a right to deny inspectors access to her *home* unless they came with a warrant.

That is the teaching of *Camara* v. *Municipal Court*, 387 U. S. 523, and *See* v. *City of Seattle*, 387 U. S. 541. In those cases we overruled *Frank* v. *Maryland*, 359 U. S. 360, and held the Fourth Amendment applicable to administrative searches of both the *home* and a business. The applicable principle, as stated in *Camara* as "justified by history and by current experience" is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U. S., at 528–529. In *See* we added that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id.*, at 543. There is not the slightest hint in *See* that the Government could

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tional to withhold a social security benefit conditioned on a limitation of freedom of association. A right-privilege distinction was implicitly rejected in *Speiser* and explicitly rejected in *Sherbert*. Today's decision when dealing with a state statute joins *Fleming* as an anomoly in the cases dealing with unconstitutional conditions.

condition a business license on the "consent" of the licensee to the administrative searches we held violated the Fourth Amendment. It is a strange jurisprudence indeed which safeguards the businessman at his place of work from warrantless searches but will not do the same for a mother in her *home*.

Is a search of her home without a warrant made "reasonable" merely because she is dependent on government largesse?

Judge Skelly Wright has stated the problem succinctly:

> "Welfare has long been considered the equivalent of charity and its recipients have been subjected to all kinds of dehumanizing experiences in the government's effort to police its welfare payments. In fact, over half a billion dollars are expended annually for administration and policing in connection with the Aid to Families with Dependent Children program. Why such large sums are necessary for administration and policing has never been adequately explained. No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few. The truth is that in this subsidy area society has simply adopted a double standard, one for aid to business and the farmer and a different one for welfare." Poverty, Minorities, and Respect For Law, 1970 Duke L. J. 425, 437–438.

If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children, like social security and unemployment benefits,

has an aura of suspicion.[9] There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. It is the precincts of the *home* that the Fourth Amendment protects; and their privacy is as important to the lowly as to the mighty.[10]

". . . studies tell us that the typical middle income American reaches retirement age with a whole

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[9] Juvenal wrote

"Poverty's greatest curse, much worse than the fact of it, is that it makes men objects of mirth, ridiculed, humbled, embarrassed." Satires (Indiana Univ. Press 1958), p. 39.

In the 1837 Term the Court held in *City of New York* v. *Miln*, 11 Pet. 102, that New York could require ships coming in from abroad to report the names, ages, etc. of every person brought to these shores. The Court said: "We think it is as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts: as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease."

I regretfully conclude that today's decision is ideologically of the same vintage.

[10] An individual who refuses to allow the home visit could either be a welfare recipient at the time or an applicant for assistance. In neither case would the outcome of the refusal be different.

If the mother is already a recipient, Social Service Regulation 351.21 requires continuing contacts at home between the recipient and the social worker. Should a recipient refuse a visit then § 175 of the Policies Governing the Administration of Public Assistance ("Mandatory visits must be made in accordance with law that requires that persons be visited . . . .") would require termination. When the decision to "discontinue, suspend or reduce" benefits is made, the recipient would receive a hearing under § 351.26

bundle of interests and expectations: as homeowner, as small investor, and as social security 'beneficiary.' Of these, his social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded his other interests? It becomes the task of the rule of law to surround this new 'right' to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards en-

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at which the recipient could present "written and oral relevant evidence and argument to demonstrate why his grant should not be discontinued, suspended or reduced." Since § 134 of the Social Services Law requires visits, the refusal to allow the visit would apparently be dispositive of the matter.

That seems to be conceded here by the commissioner. In light of that fact, the failure of appellee, who went to a hearing and was denied relief, to pursue any further state remedy seems irrelevant as the only question posed was the constitutionality under the Fourth Amendment of the termination of assistance for failure to agree to the warrantless entry into her home.

Except in very limited circumstances (Social Service Regulations 351.10 and 372 (Emergency Assistance)) an initial home visit and investigation is necessary before receiving benefits. Should a potential recipient refuse the initial visit, she would be notified under 351.14 (b) of the reason for the denial. Then she could request a "fair hearing" under Board Rule 85 and Social Service Regulation 358. Again it appears that refusing the visit would be dispositive of the claim.

The extent to which a person could receive emergency assistance after refusal of a visit is unclear. Social Service Regulation 372.3 recognizes that emergency assistance could be available to a person while the "fair hearing" is pending. It would seem, however, that implicit in 372.3 is the notion that, if the claim is disposed of, then the emergency assistance would terminate. Also emergency assistance is limited to periods not in excess of 30 consecutive days in any 12-month period. Regulation 372.1.

> joyed by traditional rights of property in the best tradition of the older law." [11]

It may be that in some tenements one baby will do service to several women and call each one "mom." It may be that other frauds, less obvious, will be perpetrated. But if inspectors want to enter the precincts of the home against the wishes of the lady of the house, they must get a warrant. The need for exigent action as in cases of "hot pursuit" is not present for the lady will not disappear; nor will the baby.

I would place the same restrictions on inspectors entering the *homes* of welfare beneficiaries as are on inspectors entering the *homes* of those on the payroll of government, or the *homes* of those who contract with the government, or the *homes* of those who work for those having government contracts. The values of the *home* protected by the Fourth Amendment are not peculiar to capitalism as we have known it; they are equally relevant to the new form of socialism which we are entering. Moreover, as the numbers of functionaries and inspectors multiply, the need for protection of the individual becomes indeed more essential if the values of a free society are to remain.

What Lord Acton wrote Bishop Creighton [12] about the corruption of power is increasingly pertinent today:

> ". . . I cannot accept your canon that we are to judge Pope and King unlike other men, with a favorable presumption that they did no wrong. If there is any presumption it is the other way against

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[11] Jones, The Rule of Law and the Welfare State, 58 Col. L. Rev. 143, 154–155 (1958).

[12] Acton, Essays on Freedom and Power edited by Herman Finer, 364 (1948).

> holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority."

The bureaucracy of modern government is not only slow, lumbering, and oppressive; it is omnipresent. It touches everyone's life at numerous points. It pries more and more into private affairs, breaking down the barriers that individuals erect to give them some insulation from the intrigues and harrassments of modern life.[13] Isolation is not a constitutional guarantee; but the sanctity of the sanctuary of the *home* is such—as marked and defined by the Fourth Amendment, *McDonald* v. *United States,* 335 U. S. 451, 453. What we do today is to depreciate it.

I would sustain the judgment of the three-judge court in the present case.

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[13] Mass raids upon the homes of welfare recipients are matters of record. See *Parrish* v. *Civil Service Commission,* 66 Cal. 2d 260, 425 P. 2d 223, where an inspector was discharged because he refused to engage in such "illegal activity" and was granted relief by way of back pay.

APPENDIX I TO OPINION

STATISTICAL ABSTRACT OF THE UNITED STATES, 1970, p. 277.

SOCIAL WELFARE EXPENDITURES, BY SOURCE OF FUNDS AND PUBLIC PROGRAM: 1967 TO 1969

(In millions of dollars)

PROGRAM	1967		1968		1969 (prel.)	
	Federal	State and local	Federal	State and local	Federal	State and local
Total	**52,244**	**46,449**	**60,548**	**51,497**	**68,585**	**55,206**
Social insurance	**30,544**	**6,734**	**35,391**	**7,982**	**40,824**	**7,896**
Old-age, survivors, disability, health ins.	24,581	(X)	28,748	(X)	33,289	(X)
Health insurance for the aged	3,295	(X)	5,347	(X)	6,598	(X)
Railroad retirement	1,278	(X)	1,417	(X)	1,547	(X)
Public employee retirement [1]	3,725	2,178	4,167	2,416	4,720	2,740
Unemployment ins. and employment serv. [2]	790	1,963	873	2,055	932	2,021
Railroad unemployment insurance	35	(X)	46	(X)	45	(X)
Railroad temporary disability insurance	38	(X)	36	(X)	38	(X)
State temporary disability insurance [3]	(X)	530	(X)	574	(X)	525
Hospital and medical benefits	(X)	54	(X)	55	(X)	58
Workmen's compensation [4]	94	2,054	103	2,257	114	2,500
Hospital and medical benefits	14	651	15	780	17	833
Public aid	**5,244**	**3,567**	**6,485**	**4,627**	**7,851**	**5,592**
Public assistance	4,266	3,567	5,250	4,627	6,260	5,592
Vendor medical payments	1,157	1,226	1,703	1,521	2,195	2,235
Other [5]	979	–	1,206	–	1,462	–
Health and medical programs [6]	**3,681**	**4,128**	**4,223**	**4,620**	**4,497**	**4,321**
Hospital and medical care	1,886	2,678	1,635	2,708	1,967	2,827
Civilian programs	164	2,638	157	2,708	180	2,827
Defense Department [7]	1,432	(X)	1,648	(X)	1,786	(X)
Maternal and child health programs [8]	130	171	151	176	192	190
Medical research	1,290	65	1,479	69	1,401	73
School health (educational agencies)	(X)	178	(X)	190	(X)	204
Other public health activities [9]	373	667	427	434	551	527
Medical facilities construction	294	280	332	461	386	500
Defense Department	50	(X)	29	(X)	50	(X)
Other	284	280	305	461	337	500
Veterans programs	**6,887**	**23**	**7,329**	**33**	**7,996**	**40**
Pensions and compensation [10]	4,487	(X)	4,716	(X)	5,041	(X)
Health and medical programs	1,346	(X)	1,485	(X)	1,585	(X)
Hospital and medical care	1,250	(X)	1,372	(X)	1,478	(X)
Hospital construction	49	(X)	46	(X)	54	(X)
Medical and prosthetic research	47	(X)	48	(X)	53	(X)
Education	227	(X)	486	(X)	571	(X)
Life insurance [11]	548	(X)	304	(X)	208	(X)
Welfare and other	179	23	179	33	197	40
Education [12]	**5,279**	**30,289**	**5,186**	**33,648**	**5,879**	**37,954**
Elementary and secondary	2,497	23,247	2,636	26,055	2,672	31,963
Construction [13]	33	3,927	35	4,184	34	4,620
Higher	2,089	4,400	1,907	4,800	1,943	5,100
Construction	710	900	674	1,000	631	1,100
Vocational and adult [14]	552	742	519	793	514	891
Housing	**253**	**95**	**335**	**103**	**446**	**110**
Other social welfare	**1,356**	**1,524**	**1,706**	**1,736**	**1,963**	**2,293**
Vocational rehabilitation, total	319	91	363	106	431	127
Medical services and research	78	17	96	26	116	31
Institutional care [15]	15	880	23	1,015	26	1,464
School meals	442	147	544	182	634	171
Child welfare [16]	47	406	50	453	80	500
Special OEO programs [17]	452	(X)	608	(X)	647	(X)
Social welfare, not elsewhere classified [18]	81	(X)	118	(X)	126	(X)

– Represents zero. X Not applicable.

[1] Excludes refunds to those leaving service. Federal data include military retirement.

[2] Includes compensation for Federal employees and ex-servicemen, and trade adjustment and cash training allowances.

[3] Programs operate in 4 States only: Calif., N.J., N.Y., and R.I. [4] Benefits by private insurance carriers, State funds, and self-insurers. [5] Work relief, other emergency aid, surplus food for the needy, food stamps, and Job Corps, Neighborhood Youth Corps, and Work-Experience programs under the Economic Opportunity Act.

[6] Excludes domiciliary care in institutions other than mental or tuberculosis, and services included with other programs in social welfare series. [7] Includes cost of medical care for military dependent families.

[8] Includes services for crippled children. [9] Excludes water supply and sanitation services.

[10] Includes burial awards. [11] Excludes servicemen's group life insurance. [12] Federal expenditures for administrative costs (Office of Education) and research not shown separately but included in total.

[13] Construction costs of vocational and adult education programs included under elementary-secondary expenditures.

[14] Represents primarily surplus food for nonprofit institutions. [15] Represents primarily child welfare services under title V of the Social Security Act. [16] Includes community action, migrant workers, and VISTA programs and all administrative expenses of the Office of Economic Opportunity.

[17] Includes administrative expenses of the Secretary of Health, Education, and Welfare; Indian welfare; aging activities; certain manpower activities; and other items.

Source: Dept. of Health, Education, and Welfare, Social Security Administration; *Social Security Bulletin*, December 1969.

APPENDIX II

Hearings, S. Committee on Appropriations, H. R. 17923, 91st Cong., 2d Sess., 1971, Pt. 3, p. 1979.

U. S. Department of Agriculture
Agricultural Stabilization and Conservation Service
ASCS Payments to Producers, All Programs,[1] Calendar Year 1969

	Amount	Percent of total
Total payments	$3,794,996,353	100
Payments below $5,000	2,078,439,326	55
Payments $5,000 or above	1,457,635,442	38
Undistributed[2]	258,921,585	7

[1] Includes acreage diversion payments on cotton, feed grain, and wheat; price support payments on cotton and feed grain; wheat marketing certificates; cost-share payments under the Agricultural Conservation Program, emergency conservation and Appalachia programs; land retirement and conservation assistance payments under the cropland conversion, cropland adjustment, and conservation reserve programs; and the milk indemnity payment program. Does not include any price support loans or purchases, and payments under the Sugar Act and the National Wool Act.

[2] Includes payments to producers under the Sugar Act and the National Wool Act and payments to vendors for costs of conservation materials and services and funds transferred to other agencies for conservation technical services under the Agricultural Conservation Program; promotion fund deduction withheld under the National Wool Act which were transferred to the National Sheep Producers Council.

ASCS Payments by Size Groupings $5,000 and over
(Excludes sugar and wool payments)

Range	Number	Amount
$5,000 to $7,499	61,330	$ 370,839,000
$7,500 to $9,999	25,859	222,488,754
$10,000 to $14,999	21,147	254,979,861
$15,000 to $24,999	12,856	242,547,832
$25,000 to $49,999	6,029	200,524,421
$50,000 to $99,999	1,404	91,191,225
$100,000 to $499,999	346	55,113,824
$500,000 to $999,999	11	7,668,176
$1,000,000 and over	5	12,282,349
Total	128,987	$1,457,635,442

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1970

George K. Wyman, Individually and as Commissioner of the State of New York, Department of Social Services, et al., Appellant, *v.* Barbara James, Etc.	On Appeal From the United States District Court for the Southern District of New York.

[January 12, 1971]

Mr. Justice Marshall, whom Mr. Justice Brennan joins, dissenting.

Although I substantially agree with its initial statement of the issue in this case, the Court's opinion goes on to imply that the appellee has refused to provide information germane to a determination of her eligibility for AFDC benefits. The record plainly shows, however, that Mrs. James offered to furnish any information that the appellants desired and to be interviewed at any place other than her home. Appellants rejected her offers and terminated her benefits solely on the ground that she refused to permit a home visit. In addition, appellants make no contention that any sort of probable cause exists to suspect appellee of welfare fraud or child abuse.

Simply stated, the issue in this case is whether a state welfare agency can require all recipients of AFDC benefits to submit to warrantless "visitations" of their homes. In answering that question, the majority dodges between constitutional issues to reach a result clearly inconsistent with the decisions of this Court. We are told that there is no search involved in this case; that even if there were a search, it would not be unreasonable; and

that even if this were an unreasonable search, a welfare recipient waives her right to object by accepting benefits. I emphatically disagree with all three conclusions. Furthermore, I believe that binding regulations of the Department of Health, Education, and Welfare prohibit appellants from requiring the home visit.

I

The Court's assertion that this case concerns no search "in the Fourth Amendment meaning of the term" is neither "obvious" nor "simple." I should have thought that the Fourth Amendment governs all intrusions by agents of the public upon personal security, *Terry* v. *Ohio*, 392 U. S. 1, 18, n. 15 (1968). As MR. JUSTICE HARLAN has said:

> ". . . the Constitution protects the privacy of the home against all unreasonable intrusions of whatever character. . . . [It applies] to all invasions on the part of the government and its employés of the sanctity of a man's home," *Poe* v. *Ullman*, 367 U. S. 497, 550–551 (1961) (dissenting opinion).

This Court has rejected as "anomalous" the contention that only suspected criminals are protected by the Fourth Amendment, *Camara* v. *Municipal Court*, 387 U. S. 523, 530 (1967). In an era of rapidly burgeoning governmental activities and their concomitant inspectors, caseworkers, and researchers, a restriction of the Fourth Amendment to "the traditional criminal law context" tramples the ancient concept that a man's home is his castle. Only last Term, we reaffirmed that this concept has lost none of its vitality, *Rowan* v. *United States Post Office*, 397 U. S. 728, 738 (1970).

Even if the Fourth Amendment does not apply to each and every governmental entry into the home, the welfare visit is not some sort of purely benevolent inspec-

tion. No one questions the motives of the dedicated welfare caseworker. Of course, caseworkers seek to be friends, but the point is that they are also required to be sleuths. The majority conceeds that the "visitation" is partially investigative, but claims that this investigative aspect has been given "too much emphasis." Emphasis has indeed been given. Time and again, in briefs and at oral argument, appellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies.[1] The New York statutes provide emphasis by requiring all caseworkers to report any evidence of fraud which a home visit uncovers, N. Y. Social Welfare Law § 145, McKinney 1966. And appellants have strenuously emphasized the importance of the visit to provide evidence leading to civil forfeitures including elimination of benefits and loss of child custody.

Actually, the home visit is precisely the type of inspection proscribed by *Camara* and its companion case, *See* v. *City of Seattle*, 387 U. S. 541 (1967), except that the welfare visit is a more severe intrusion upon privacy and family dignity. Both the home visit and the searches in those cases may convey benefits to the householder. Fire inspectors give frequent advice concerning fire prevention, wiring capacity and other matters, and obvious self-interest causes many to welcome the fire or safety inspection. Similarly, the welfare caseworker may provide welcome advice on home management and child care. Nonetheless, both searches may result in the imposition of civil penalties—loss or reduction of welfare benefits or an order to upgrade a housing defect. The fact that one purpose of the visit is to pro-

[1] For example, appellants' Reply Brief offers two specific illustrations of the home visit's efficacy. In the first, a man was discovered in the home and benefits were terminated. In the second, child abuse was discovered.

vide evidence which may lead to an elimination of benefits is sufficient to grant appellee protection since *Camara* stated that the Fourth Amendment applies to inspections which can result in only civil violations, 387 U. S., at 531. But here the case is stronger since the home visit, like many housing inspections, may lead to criminal convictions.

The Court attempts to distinguish *See* and *Camara* by telling us that those cases involved "true" and "genuine" searches. The only concrete distinction offered is that *See* and *Camara* concerned criminal prosecutions for refusal to permit the search. The *Camara* opinion did observe that one could be prosecuted for a refusal to allow that search; but, apart from the issue of consent, there is neither logic in, nor precedent for, the view that the ambit of Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen. Even if the magnitude of the penalty were relevant, which sanction for resisting the search is more severe? For protecting the privacy of her home, Mrs. James lost the sole means of support for herself and her infant son. For protecting the privacy of his commercial warehouse, Mr. See received a $100 suspended fine.

Conceding for the sake of argument that someone might view the "visitation" as a search, the majority nonetheless concludes that such a search is not unreasonable. However, their mode of reaching that conclusion departs from the entire history of Fourth Amendment caselaw. Of course, the Fourth Amendment test is reasonableness, but in determining whether a search is reasonable, this Court is not free merely to balance, in a totally ad hoc fashion, any number of subjective factors. An unbroken line of cases holds that, subject to a few narrowly drawn exceptions, any search without a warrant is constitutionally unreasonable, see, *e. g.*, *Agnello*

v. *United States.*, 269 U. S. 20, 32 (1925); *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948); *Chapman* v. *United States*, 365 U. S. 610, 613–615 (1961); *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967); *Chimel* v. *California*, 395 U. S. 752, 762 (1969); *Vale* v. *Louisiana*, 399 U. S. 30, 34–35 (1970). In this case, no suggestion that evidence will disappear, that a criminal will escape, or that an officer will be injured, justifies the failure to obtain a warrant. Instead, the majority asserts what amounts to three state interests which allegedly render this search reasonable. None of these interests is sufficient to carve out a new exception to the warrant requirement.

First, it is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.

Second, the Court contends that caseworkers must enter the homes of AFDC beneficiaries to determine eligibility. Interestingly, federal regulations do not require the home visit. In fact, the regulations specify the recipient himself as the primary source of eligibility information thereby rendering an inspection of the home only one of several alternative secondary sources.[2] The majority's implication that a biannual home visit somehow assures the verification of actual residence or actual

[2] Handbook, § 2200 (e) (1).

physical presence in the home strains credulity in the context of urban poverty. Despite the caseworker's responsibility for dependent children, he is not even required to see the children as a part of the home visit.[3] Appellants offer scant explanation for their refusal even to attempt to utilize public records, expenditure receipts, documents such as leases, non-home interviews, personal financial records, sworn declarations, etc.—all sources which governmental agencies regularly accept as adequate to establish eligibility for other public benefits. In this setting, it ill behooves appellants to refuse to utilize informational sources less drastic than an invasion of the privacy of the home.

We are told that the plight of Mrs. James is no different from that of a taxpayer who is required to document his right to a tax deduction, but this analogy is seriously flawed. The record shows that Mrs. James has offered to be interviewed anywhere other than her home, to answer any questions and to provide any documentation which the welfare agency desires. The agency curtly refused all these offers and insisted on its "right" to pry into appellee's home. Tax exemptions are also governmental "bounty." A true analogy would be an Internal Revenue Service requirement that in order to claim a dependency exemption, a taxpayer *must* allow a specially trained IRS agent to invade the home for the purpose of questioning the occupants and looking for evidence that the exemption is being properly utilized for the benefit of the dependent. If such a system

[3] Appellants respond by asserting that if the caseworker becomes suspicious concerning the child's absence, further investigation may take place. One certainly would hope that the caseworker would continue her investigation, but the fact remains that the failure to require that the child be seen undercuts the argument that the home visit is designed to protect the child's welfare and necessary to verify his presence in the home.

were even proposed, the cries of constitutional outrage would be unanimous.

Appellants offer a third state interest which the Court seems to accept as partial justification for this search. We are told that the visit is designed to rehabilitate, to provide aid. This is strange doctrine indeed. A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy. More than 40 years ago, Mr. Justice Brandeis warned:

> ". . . experience should teach as to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead* v. *United States*, 277 U. S. 438, 479 (1928) (dissenting opinion).

Throughout its opinion, the majority alternates between two views of the State's interest in requiring the home visit. First we are told that the State's purpose is benevolent so that no search is involved. Next we are told that the State's need to prevent child abuse and to avoid the misappropriation of welfare funds justifies dispensing with the warrant requirement. But when all the State's purposes are considered at one time, I can only conclude that the home visit is a search and that, absent a warrant, that search is unreasonable.[4]

Although the Court does not agree with my conclusion that the home visit is an unreasonable search, its opinion suggests that even if the visit were unreason-

[4] Since the majority refuses to sanction the warrant procedure in any form, I have not discussed what standard should be required for a warrant to issue. Certainly, if one of the purposes of the welfare search is to obtain evidence of criminal conduct, that is no reason to permit less than probable cause. And because the home visit is a more severe intrusion than is the housing inspection and there are less drastic means to obtain eligibility information I would apply the analysis of *Camara* and would be inclined to utilize a traditional probable cause standard.

able, appellee has somehow waived her right to object. Surely the majority cannot believe that valid Fourth Amendment consent can be given under the threat of the loss of one's sole means of support. Nor has Mrs. James waived her rights. Had the Court squarely faced the question of whether the State can condition welfare payments on the waiver of clear constitutional rights, the answer would be plain. The decisions of this Court do not support the notion that a State can use welfare benefits as a wedge to coerce "waiver" of Fourth Amendment rights, see Reich, Midnight Welfare Searches and the Social Security Act, 72 Yale L. J. 1347, 1349–1350 (1963); Rehabilitation, Investigation and the Welfare Home Visit, 79 Yale L. J. 746, 758 (1970). In *Sherbert* v. *Verner* this Court did not say, "Aid merely ceases. There is no abridgement of religious freedom." Nor did the Court say in *Speiser* v. *Randall*, "The tax is simply increased. No one is compelled to relinquish First Amendment rights." As my Brother DOUGLAS points out, the majority's statement that Mrs. James' "choice (to be searched or to lose her benefits) is entirely hers and nothing of constitutional magnitude is involved" merely restates the issue. To MR. JUSTICE DOUGLAS' eloquent discussion of the law of unconstitutional conditions, I would add only that this Court last Term reaffirmed *Sherbert* and *Speiser* as applicable to the law of public welfare:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to the disqualification for unemployment compensation . . . denial of tax exemptions . . . or discharge from public employment." *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970).

II

The Court's examination of the constitutional issues presented by this case has constrained me to respond.

It would not have been necessary to reach these questions for I believe that HEW regulations, binding on the States, prohibit the unconsented home visit.[5]

The federal Handbook of Public Assistance Administration provides:

> "The [state welfare] agency especially guards against violation of legal rights and common decencies in such areas as entering a home by force, *or without permission,* or under false pretenses; making home visits outside of working hours, and particularly making such visits during sleeping hours; . . ." Part IV, § 2300 (a) (emphasis supplied).

Although the tone of this language is descriptive, HEW requirements are stated in terms of principles and objectives, Handbook, Part I, § 4210 (3); and appellants do not contend that this regulation is merely advisory. Instead, appellants respond with the tired assertion that consent obtained by threatening termination of benefits constitutes valid permission under this regulation. There is no reason to suspect that HEW shares this crabbed view of consent. The Handbook, itself, insists on careful scrutiny of purported consent, Part IV, § 2400. Section 2200 (a) is designed to protect the privacy of welfare recipients, and it would be somewhat ironic to adopt a construction of the regulation which provided

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[5] It is a time-honored doctrine that statutes and regulations are first examined by a reviewing court to see if constitutional questions can be avoided, *Ashwander* v. *T. V. A.*, 297 U. S. 346, 346–348 (1936) (Brandeis, J., concurring); see, *e. g., Dandridge* v. *Williams*, 397 U. S. 471 (1970); *King* v. *Smith*, 392 U. S. 309 (1968). The court below chose not to invoke this doctrine, and litigation in this Court has emphasized the constitutional issues. However, the nonconstitutional questions were briefed by an *amicus curiae* and appellants responded fully in their Reply Brief. The parties may prefer a decision on constitutional grounds; but we, of course, are not bound by their litigation strategies.

that any person who invokes his privacy rights ceases to be a recipient.

Appellants next object that the home visit has long been a part of welfare administration and has never been disapproved by HEW. The short answer to this is that we deal with only the *unconsented* home visit. The general utility and acceptance of the home visit casts little light on whether HEW might prefer not to impose the visit on unwilling recipients. Appellants also remind us that the Federal Government itself requires a limited number of home visits for sampling purposes. However, while there may well be a special need to employ mandatory visits as a part of quality control samples, Mrs. James' home was not a part of such a sample. Furthermore appellants admit that § 2200 (a) governs the quality control program; so it is not clear that unconsented home visits are allowed even for sampling purposes. Although there appears to be no regulatory history, appellants tell us § 2200 (a) merely permits a recipient to refuse a particular home visit and does not allow him to forbid home visits altogether. I suppose that one could read such a limitation into the section, but given the regulation's explicit language, given that HEW does not require home visits and views the visits as only one of several alternative sources of eligibility information, given HEW's concern for the privacy of its clients, and given the durable principle of this Court that doubtful questions of interpretation should be resolved in a manner which avoids constitutional questions, *United States* v. *Delaware & Hudson Co.*, 213 U. S. 306, 407 (1909), I would conclude that Mrs. James is protected by § 2200 (a).

III

In deciding that the homes of AFDC recipients are not entitled to protection from warrantless searches by

welfare caseworkers, the Court declines to follow prior caselaw and employs a rationale that, if applied to the claims of all citizens, would threaten the vitality of the Fourth Amendment. This Court has occasionally pushed beyond established constitutional contours to protect the vulnerable and to further basic human values. I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor. Perhaps the majority has explained why a commercial warehouse deserves more protection than does this poor woman's home. I am not convinced; and therefore, I must respectfully dissent.